INDEX

	PAGE
Statement under Rule 13	1-2
Complaint	3-10
Order to show cause dated Jan. 6, 1942	11-12
Affidavit of Whitney North Seymour	13-16
Affidavit of M. Herbert Eisenhart	17-31
Affidavit of Carl L. Bausch	32
Affidavit of Theodore B. Drescher	33
Affidavit of E. Herman Anthes	34-36
Affidavit of Russel E. Craytor	37-38
Notice of motion dated January 6, 1942	39-40
Affidavit of Karl A. Bauer	41-45
Order to show cause, dated January 14, 1942	46-48
Affidavit of Whitney North Seymour	49-53
Notice of rejection, dated January 14, 1942	54
Affidavit of Jack Kemp Busby	55-56
Order to show cause dated January 14, 1942	57-59
Affidavit of Joshua D. Jones	60-63
Answering affidavit of Emanuel Thebner	64-76
Corroborating affidavit of Murray Brensilber	77
Amended complaint	78-85
Indictment of defendants (C 107—169)	86-111
Bill of particulars (C 107—169) as to Bausch & Lomb	112-193

PAGE

Bill of particulars (C 107—169) as to Carl Zeiss, Inc. 194-211
Bill of complaint in equity and exhibits attached thereof 212-242
Consent decree in equity 243-248

Replying affidavit of Whitney North Seymour .. 249-253

Order declaring amended complaint a nullity 254-258

Order and judgment of dismissal dated January 24, 1942 and February 2, 1942 respectively 259-262

Notice of appeal 263-264

Stipulation as to record 265

Clerk's certificate 266

Proceedings in U. S. C. C. A., Second Circuit 267
Opinion, per curiam 267
Judgment 270
Clerk's certificate ..... (omitted in printing) 270
Order allowing certiorari 271

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf, 1

Plaintiffs-Appellants,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants-Respondents.

Statement Under Rule 13.

This action was commenced in the United States District Court for the Southern District of New York by filing a complaint on December 17, 1941. Copies of the summons and complaint were served on Bausch & Lomb Optical Co. and the individual defendants by the United States Marshal, Western District of New York, at Rochester, N. Y. 2

The names of the parties are as herein above given.

There has been no change of parties in this action since the commencement thereof.

The defendants were not arrested nor was any bail taken. No property was attached.

No trial has been had in this action.

No question was referred to a commissioner, master or referee. 3

Defendants moved before answering, in the District Court for summary judgment in defendants' favor, pursuant to rule 56 and for an order under rule 12 of the Federal rules of Civil procedure, on papers served on or about January 6, 1942 and January 14, 1942 respectively. All motions were heard simultaneously by Honorable Alfred C. Coxe, District Judge on the 16th day of January 1942.

Statement Under Rule.

Order for judgment granting defendants' summary judgment and directing that judgment be entered for the defendants, dismissing the complaint on the merits together with
4 the costs and disbursements of the action was entered in the office of the Clerk of the District Court on January 24, 1942 and judgment dismissing the complaint of the plaintiffs upon the merits with costs in favor of the defendants was filed and entered in the office of the Clerk of the District Court on February 2, 1942. A further order declaring plaintiffs' amended complaint a nullity was entered in the Office of the Clerk of the District Court on the 24th day of January 1942.

The appeal herein was taken on February 6, 1942 and a
5 supersedeas and cost bond was duly filed herein.

6

Original Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

7

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants.

8

Plaintiffs complaining of the defendants respectfully allege as follows:

First: That the plaintiffs are and at all times herein mentioned were, and each of them is, a citizen of the United States of America and of the State of New York, and each of them is a resident of the State of New York.

Second: The plaintiffs bring this action in behalf of the United States of America and in their own behalf by virtue of and pursuant to United States Revised Statutes Sections 3490-3494 (31 U. S. C. 231-235) under which said statutes this action arises. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

9

Third: Upon information and belief that the defendant, Bausch & Lomb Optical Company is a New York Corporation and has maintained and now maintains an office and place of business in the Borough of Manhattan, City of New York within this Southern District of New York, and has

transacted business and now transacts business within sa
District.

10 Fourth: That upon information and belief, Carl Zei
Inc. is a New York Corporation and has maintained a
now maintains its principal office in the Borough of Ma
hattan, City of New York within this Southern District
New York, and has transacted business and now transac
business within said District.

Fifth: Upon information and belief, M. H. Eisenha
Carl L. Bausch and Theodore B. Drescher, are and each
them is and was at the times herein mentioned, associat
with Bausch & Lomb Optical Company and Carl Zeiss In
and has held and at the present time hold the position of
11 officer and director of each of said corporations and we
and are actively engaged in the management, direction a
control of the affairs and policies of said corporations.

Sixth: Upon information and belief that the said Baus
& Lomb Optical Company and Carl Zeiss Inc. are and we
at the times herein mentioned engaged in the business
manufacturing and selling of various instruments, amo
others, periscopes, range finders, altimeters, bore-sigh
bombsights, torpedo directors, sights for guns and oth
scientific optical instruments (except binoculars) used
direct and control the firing of modern instruments of w
12 fare, hereinafter referred to as "military optical inst
ments".

Seventh: That upon information and belief the Uni
States Government purchased such military optical inst
ments for use on battleships, cruisers and submarines, a
for use with aircraft and artillery.

Eighth: The defendant, Bausch & Lomb Optical Company, from on or about April 28, 1921, and the defendant Carl Zeiss Inc. from the date of its incorporation on or about December 11, 1925, and the individual defendants since the time they became officers and directors of said corporation to on or about March 29, 1940, together with other persons to the plaintiffs unknown, have been continuously engaged during and throughout the periods of time aforesaid, in an unlawful combination and conspiracy, not to sell directly or indirectly military optical instruments for use in the United States of America and the Government of the United States of America by either of them without the consent of the other and in the case of sales made by consent to the United States Government, to fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments, and agreed between them that quotations of prices by either of them could be made only with the consent of the other, and that if either of them were requested to make or made bids for the sale of military optical instruments to the United States Government, that such quotations and such bids would contain a markup over the regular price up to 20% of said regular price, and in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

Ninth: That upon information and belief to the end and purpose aforesaid and to carry out and promote the unlawful combination and conspiracy by and between them, the said corporate defendants entered into certain written agreements on or about April 28, 1921, and supplemental and modifications thereof on or about June 27, 1925, on or about October 28, 1925, on or about November 26, 1926, and on or

about December 24, 1926, wherein and whereby the said corporate defendants bound themselves not to sell such military optical instruments directly or indirectly to the United
16 States Government unless the parties have come to an agreement regarding the conditions of sale, and a royalty or percentage of the gross sales price of each military optical instrument sold to the United States Government by either of them to be paid to the other, and agreed, among other things, that neither of them would make or give quotations or bids for sales of military optical instruments without the consent of the other, and that the price quoted should be agreed upon between them, and that on all such bids by either of them to the United States Government, such bids
17 and quotations would contain a markup over the regular price up to 20% over the regular price, which excess in case such bid were successful, was to be paid by the successful bidder to the other contracting party.

Tenth: That upon information and belief, between April 28, 1921 and March 29, 1940 the combination and conspiracy hereinbefore alleged has been operated and carried out in part within the Southern District of New York and said corporate defendants have by their concerted action aforesaid, sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and noncompetitive prices agreed
18 upon by the defendants, and said defendants received payments from the United States Government for the sale and delivery of such military optical instruments which they divided between them in accordance with their said agreements.

Eleventh: Upon information and belief that in pursuance of said conspiracy, combination and agreements by

the defendants, they severally at various times between May 1921 and March 1940, did submit to the Government of the United States bids for contracts for the manufacture and sale and the sale of military optical instruments and other articles and materials to be used by the United States Government in the War, Navy and other departments and bureaus of the Government at prices that pretended to be and were represented to be, and which the Government of the United States and the officer and officers authorized to accept such bids and enter into such contracts for manufacture and sale, and the sale and delivery of such military optical instruments, articles and materials for which bids were submitted and contracts therefor and sales and delivery thereof made, believed to be the normal, prevailing and competitive prices of such military optical instruments, articles and materials, but which in fact were not the normal, prevailing and competitive prices therefor but were about 20% in excess of the normal, prevailing and competitive prices for such military optical instruments, articles and materials, and the officer or officers authorized to accept such bids and enter into such contracts of sale and make such purchases on behalf of the Government of the United States, the Treasury, War and Navy Departments, respectively, without knowledge of the conspiracy, combination and agreement aforesaid entered into by the defendants, accepted various bids submitted by the defendants severally at various times, the exact dates of which are presently unknown to the plaintiffs, for manufacture and sale and the sale of military optical instruments and other articles and materials to the Government of the United States in the War and Navy Departments thereof, and said officer or officers on behalf of the Government of the United States, its Treasury, War and Navy Departments, did make vari-

ous purchases from time to time, the exact dates of which are unknown to the plaintiffs, of such instruments, articles and materials to be supplied to the War and Navy Depart-
22 ments in large quantities and amounts, the exact prices, amounts and particulars of which are presently unknown to the plaintiff.

Twelfth: Upon information and belief that at various times between May 1921 and March 1940, the defendants severally and from time to time, the exact dates being at present unknown to the plaintiffs, presented for payment and approval to various officers of the Civil, Military and Naval service of the United States, bids, claims, invoices, bills, vouchers and statements and accounts against the
23 United States for purchases of military optical instruments and other articles and materials upon the aforesaid bids, contracts and sales in large sums of money, the exact amount of which is at present unknown to the plaintiffs, the defendants knowing that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reason aforesaid, and in that said defendants added to the normal, prevailing and competitive prices, an amount equal to about 20% arbitrarily pursuant to the conspiracy, combination and agreement between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied.

24 Thirteenth: That upon information and belief the individual defendants and each of them participated in and aided and abetted in the matters and things herein alleged.

Fourteenth: Upon information and belief, 20% of the amount of such bids, claims, invoices, bills, statements and accounts which contained the 20% added to the regular price that were presented by the defendants and which

they caused to be presented for payment and approval and obtained payment thereof from the Government of the United States, the Treasury, Navy and War Departments, respectively in the year 1938 amounted in the aggregate, and was equal to about the sum of $8,000,000. in which said sums the defendants are indebted to the United States Government, and various sums of money in other years, the exact amount of which is at present unknown to the plaintiffs, which said sums the defendants are indebted to the United States Government. 25

Fifteenth: Upon information and belief that prior to March 1940 and at the time of the commission of the acts and conduct complained of in paragraphs "Eleventh" and "Twelfth" hereof, the corporate defendants manufactured, distributed and sold the greater part of all the military optical instruments manufactured and sold in the United States of America and in foreign countries. 26

Sixteenth: That upon information and belief the agreements, acts and conduct of the defendants constituted a fraud upon the United States of America and were and are against the Public Policy, and were a violation of the Revised Statutes of the United States, §§3490-3494 (U. S. C. 231-235).

Seventeenth: That upon information and belief the aforesaid agreements by and between the defendants herein, and the aforesaid acts and conduct constituted also an unlawful combination and conspiracy in violation of the Statutes of the United States and more particularly the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. Title 15, Sec. 1) and the Amendments thereof. 27

Eighteenth: Upon information and belief the defendants are not and were not at the times herein mentioned, nor any of them, in the military or naval service of the United States or in the Militia called into or actually employed in the service of the United States.

Nineteenth: By reason of the premises, and the acts and conduct of the defendants and the Statutes of the United States in such case made and provided, the defendants are indebted to the Government of the United States in the sum of about $20,000,000. in which amount the Government of the United States sustained damages and the defendants shall forfeit and pay to the United States the sum of $2,000. for each of said transactions and in addition double the amount of damages sustained by the Government of the United States, and of which amount of damages and forfeitures the plaintiffs herein are entitled to receive one-half of such forfeitures and amount of damages which they shall recover and collect, and all costs the Court may award against the said defendants.

WHEREFORE plaintiffs demand judgment against the defendants for the sum of double the amount of said damages aforesaid, to wit, $40,000,000., and in addition thereto the amount of forfeitures and penalties as ascertained and determined by this Court, which shall be at least in the sum of $2,000. together with the interest on said sums and the costs of this action.

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address,
111 John Street,
Borough of Manhattan,
City of New York.

Order to Show Cause Dated January 6, 1942.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

31

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

Defendants.

32

On the summons and complaint and upon the Marshal's returns herein, all filed in this Court, and upon the annexed affidavits of Whitney North Seymour, M. Herbert Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, sworn to this 5th day of January, 1942, let the plaintiffs herein and each of them show cause before this Court, at a stated term for the hearing of motions to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein,

33

(a) Dismissing this action and the complaint herein as against the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York;

Order to Show Cause Dated January 6, 1942.

(b) Dismissing this action and the complaint herein as against the said defendants, on the ground that the complaint fails to state a claim against these defendants
34 upon which relief can be granted;

(c) Granting summary judgment to these defendants on the ground that the complaint and affidavits herein show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment against the plaintiffs as a matter of law;

and for such other and further relief as to this Court may seem just and proper, together with the costs of this motion.

Sufficient cause appearing therefor, it is
35

ORDERED that the time of the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher to answer the complaint herein be and the same hereby is extended to and including ten (10) days after entry of an order disposing of this motion; and it is

FURTHER ORDERED that service of a copy of this order and the affidavits annexed, at the office of Emanuel Thebner, attorney for plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before
36 six o'clock P. M. on January 7th, 1942, be deemed sufficient service hereof.

Dated, New York, N. Y., January 6th, 1942.

ALFRED C. COXE,
United States District Judge.

AFFIDAVIT OF WHITNEY NORTH SEYMOUR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

I am an attorney and counsellor at law and a member of the firm of Simpson Thacher & Bartlett, attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action, on whose behalf the annexed motion is made.

This affidavit is submitted by me on behalf of the said defendants in support of an application for an order to show cause why an order should not be made dismissing the complaint herein on the grounds: (1) that the venue of this action has been improperly laid in the Southern District of New York, (2) for failure to state a claim against these defendants upon which relief can be granted, and (3) for summary judgment on the ground that the complaint and affidavits herein show that there is no genuine issue as to any material fact herein and that defendants are entitled to judgment against plaintiffs as a matter of law. The grounds for this motion are more fully set forth in the annexed affidavits of M. Herbert Eisenhart, Carl L. Bausch,

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor. The reasons why it is desirable and necessary that
40 this motion be brought on by order to show cause rather than the usual notice of motion, are as follows:

Rule 12 of the Federal Rules of Civil Procedure provides in effect that the service of any motion provided for in Rule 12 automatically extends the time for answering the complaint until ten days after disposition of the motion. The same Rule provides for motions to dismiss the complaint because of improper venue and for failure to state a claim upon which relief can be granted. It is not clear that affi-
41 davits may be considered on a motion to dismiss on the latter ground in this District. These moving defendants believed that the Court should be provided upon this motion with certain additional facts demonstrating the absence of merit in this action, and it was, therefore, deemed advisable to move as well for summary judgment under Rule 56b. Although it is clear under that Rule that the motion for summary judgment can be made before answering, the Rule does not provide for an extension of time to answer upon the making of the motion, nor is it entirely clear that by joining the motion for summary judgment with the motion to dismiss the complaint these defendants secure for all pur-
42 poses the benefit of the automatic extension provisions of Rule 12, since Rule 12g refers only to consolidation of motions made under that Rule. Therefore, this application for an order to show cause is made out of an abundance of caution as an application under Rule 6 to extend the time of these defendants for answering the complaint herein, and, for the reasons set forth below, to permit service of these motion papers in less than the ten days required by Rule 56c, if necessary.

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

These defendants were served in Rochester, N. Y., with the summons and complaint herein by a Deputy United States Marshal for the Western District of New York, on December 26, 1941. Their time for answering would expire on January 15, 1942 unless otherwise extended. With the holiday period and the time spent in preparing these papers, it has been impossible to make this motion returnable until January 16, 1942, since Rule 56 requires ten days' notice of the motion for summary judgment. Under Rule 56c the plaintiffs herein should be served with the order to show cause and affidavits herein on January 6, 1942, if possible. It would have been difficult, if not impossible, for these defendants to have moved more promptly. It is respectfully requested that, in the event that this order to show cause is not signed in time for service thereof and of the papers upon which it was granted on the aforesaid January 6, 1942, this Court specify such subsequent date for the service of the same as it considers adequate and proper, and to that extent shorten the time necessary for the motion under Rule 56.

43

44

This motion is made in good faith and not for purposes of delay. I verily believe from my investigation of the facts and circumstances of this action that there are good and sufficient defenses thereto, and have so informed these defendants. On behalf of my firm, I represented these defendants in the anti-trust litigation with the Government, referred to in the annexed affidavit of M. Herbert Eisenhart, and I am familiar with many of the facts set forth in said affidavit. My information leads me to believe that the Court will find this action not maintainable as a matter of law and without merit as a matter of fact.

45

No previous application for similar relief has been made.

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 6, 1942.

WHEREFORE, it is respectfully requested that an order to show cause, in the form annexed hereto, be signed bringing
46 this motion on for hearing on January 16, 1942, extending the time of these moving defendants to answer the complaint herein until ten days after the entry of an order upon said motion, and, in the event that service of the said order to show cause and the papers upon which it was granted cannot be made on January 6, 1942, as required by Rule 56c of the Federal Rules of Civil Procedure, providing that the same be served at such subsequent time and place as to the Court may seem just and proper; and that the motion herein be granted.

47 (Sworn to by Whitney North Seymour, January 5th, 1942.)

48

AFFIDAVIT OF M. HERBERT EISENHART ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

M. HERBERT EISENHART, being duly sworn, deposes and says:

I am the President and General Manager and a director of the defendant Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity) and also an individual defendant in this action. This affidavit is submitted in support of a motion made on behalf of said defendant Bausch & Lomb and the individual defendants to dismiss the complaint herein and for summary judgment in favor of said defendants upon the various grounds set forth in the order to show cause by which this motion is made returnable. The motion is brought on by order to show cause because I am advised by counsel and believe that it is desirable that an extension of time to answer the complaint be obtained during the consideration of this motion by the Court and until ten days after the decision hereon. The reasons for proceeding by order to show cause are more fully stated in the affidavit of Whitney North Seymour, Esq., of counsel for these defendants, which is annexed hereto.

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

The grounds of this motion may be summarized as follows:

52

I. The venue of this action has been improperly laid in the Southern District of New York and this action may not properly be maintained against these moving defendants in this District.

II. The complaint fails to state a claim against these defendants upon which relief can be granted.

III. No cause of action in fact exists against these defendants under United States Revised Statutes, Sections 3490-3494 (31 U. S. C. A. §§231-235) under which this action purports to be brought.

53

For convenience this affidavit will proceed with reference to these grounds of the motion.

I.

Bausch & Lomb Optical Company and the individual defendants M. Herbert Eisenhart, Carl L. Bausch and Theodore B. Drescher are not and have not been found within the jurisdictional limits of this Court nor is any of them a resident or inhabitant of the Southern District of New York. Bausch & Lomb Optical Company owns and operates a large
54 manufacturing plant at Rochester, New York, in which military optical instruments, ophthalmic goods, scientific instruments and other products are manufactured. The executive office of the Company is at Rochester, New York. While the Company maintains a small office in the City of New York for limited purposes, it is believed that the facts hereinafter set forth and those set forth in the annexed affidavits of E. Herman Anthes and Russell E. Craytor show that

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

the maintenance of this office is not sufficient to lay the venue of this action in this District.

55 I am a resident and inhabitant of the City of Rochester, New York, residing at No. 1316 East Avenue, in that City. The defendant Carl L. Bausch is a resident and inhabitant of the City of Rochester, New York, residing on Parsons Lane, in that City. The defendant Theodore B. Drescher is a resident and inhabitant of the City of Rochester, New York, residing at No. 99 Pelham Road, in that City. The City of Rochester is within the jurisdictional limits of the United States District Court for the Western District of New York and is not within the jurisdictional limits of the United States District Court for the Southern District of 56 New York. Service of process in this action was made on these moving defendants in Rochester, New York, on December 26, 1941, by a Deputy Marshal of the United States District Court for the Western District of New York. Reference is made to the Marshal's return upon said service of process in the files of this Court with the same force and effect as if set forth in full herein.

The small office maintained by Bausch & Lomb at 30 Rockefeller Plaza, in the Borough of Manhattan, City of New York, is primarily used for the purpose of displaying scientific and ophthalmic instruments manufactured by it at Rochester, New York. All substantial orders for such 57 products are transmitted to the executive office of the Company at Rochester for approval and acceptance. No officer or director of Bausch & Lomb is connected with that office nor are any of the ordinary corporate activities of the Company carried on there. These individual moving defendants perform no official functions in that office. The employees

of the Company who make that office their headquarters are under the supervision of the heads of their respective
58 departments at Rochester, with the exception of the small clerical staff which is under the control of Mr. Anthes. This office has no connection whatever with the portion of the Bausch & Lomb business involved in this action—the manufacture and sale of military optical instruments. In sum, the office is used chiefly to perform promotional functions for certain departments of the Bausch & Lomb business; final and important decisions are all made at Rochester. It is submitted that this fragment of the Company's operation does not permit the conclusion that the Company is
59 found in this District.

So far as is known, no attempt was made by the Marshal of this Court to effect service on the defendant Bausch & Lomb Optical Company by serving Mr. Anthes or anyone else employed in the said office of Bausch & Lomb in the City of New York.

This objection to the maintenance of this suit against these defendants in this Court is not a mere technical objection designed to delay or impede justice. For reasons stated later, this action is wholly without merit, and justice requires its final dismissal. But, in any event, it is essential that this action should not proceed in this Court if the venue is
60 improperly laid here because personal participation in these proceedings in New York and further absence from their official duties in Rochester would seriously impede the services which these defendants are rendering to national defense. Prior to the outbreak of the European war in 1939, Bausch & Lomb was actively engaged in the manufacture of military optical instruments for the United States Army and Navy. Thereafter the demands by the United States

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

Government on Bausch & Lomb for military optical equipment became steadily more heavy. Those demands are still 61
increasing. Bausch & Lomb, its executives and employees have done and are doing everything in their power to meet the needs of the armed forces. As President of the Company my time and energies are spent largely in discharging the executive responsibilities in connection with the production of these products for national defense. The defendants Carl L. Bausch and Theodore B. Drescher, who are also officers of the Company, are directly charged with responsibility for various phases of production of instruments for national defense. Their whole time is required at Rochester for this purpose. Employees of Bausch & Lomb Optical Company 62
familiar with the past history of transactions in military optical instruments are all located in Rochester, and are spending their full time there on the production of military optical instruments for the United States Government. Any interference with this work must be avoided. Proper regard for the requirements of military secrecy seem to me to prevent detailed presentation of the precise nature and importance of the work now being done by these defendants. However, I earnestly submit that time spent by them during the current emergency in preparing this case for trial, answering interrogatories or in appearing as witnesses would interfere seriously with matters of great importance to the 63
defense program. While any proceedings requiring attention of those concerned with production for defense would interfere with matters of importance to defense, proceedings requiring attendance at a distance from their place of business would be particularly disruptive. Accordingly even if there were not other grounds for dismissal, the action should

be dismissed for improper venue against all these moving defendants.

64 The joinder of Carl Zeiss, Inc., a New York corporation with its principal place of business within this District, cannot aid plaintiffs in attempting to lay the venue in this District. As will appear later, the agreements upon which plaintiffs purport to rely, copies of which are part of the records of this Court, show on their face that they were made not with Carl Zeiss, Inc. but with Carl Zeiss of Jena, Germany, not named as a defendant in this action and not within the jurisdiction.

II.

65

I have been advised by counsel and believe that on its face this complaint states no cause of action against these defendants and dismissal is sought on this ground. No useful purpose would be served by presenting any part of the legal argument here. I am advised by counsel and believe that the Statute under which this action purports to be brought was not aimed at nor does it cover even transactions of the character falsely and erroneously alleged in the complaint.

III.

66 The Court should dismiss this complaint and grant summary judgment in favor of these moving defendants under Rules 12 and 56 of the Federal Rules of Civil Procedure because no cause of action under the Statute invoked by plaintiffs exists in fact against these moving defendants. The complaint is made up largely of false and erroneous conclusions of law and of fact, many of them in direct con-

tradiction of facts which this Court may notice in the files of the Court. There is no genuine issue as to any material fact herein and the moving defendants are entitled to judgment as a matter of law. 67

A.

On March 26, 1940, the Anti-Trust Division of the Department of Justice procured the return of an indictment (C-107—169) in this Court against these moving defendants for alleged violations of the Sherman Anti-Trust Act and the Wilson Tariff Act, and covering the same subject matter as is now covered by the complaint in this action. Reference is made to the original indictment in the files of this Court for its scope and nature with the same force and effect as if fully set forth herein, but these defendants do not concede the correctness of all of the charges made in that indictment. The defendants originally pleaded not guilty to this indictment. On May 27, 1940, these defendants applied through counsel to Judge Goddard in open Court for leave to change their pleas of not guilty to pleas of *nolo contendere.* The Court was urged to permit this change of plea and to accept pleas of *nolo contendere* by counsel for these defendants and also by Hon. Samuel S. Isseks, Special Assistant to the Attorney General, representing the Anti-Trust Division of the Department of Justice. As the stenographic transcript of the proceedings shows, counsel for these defendants stated to the Court on that occasion that the primary reason for this change of plea was to permit these defendants to proceed with their defense work for the Army and Navy without the interruption which would have been entailed in preparing for and participating in the trial of 68 69

the criminal proceeding. In the course of the proceedings
70 before Judge Goddard, Judge Goddard asked Mr. Isseks whether any charge of fraud on the part of these defendants was involved, and Mr. Isseks replied: "No, sir, there is no charge of fraud against the defendants in connection with the acts complained of in the indictment." Judge Goddard accepted the pleas and, with the consent of these defendants, imposed fines totalling $40,000 upon them. This indictment was returned and disposed of after a thorough investigation by representatives of the Department of Justice, and the statement by Government counsel before Judge Goddard seems quite inconsistent with the charges of fraud made in
71 this complaint.

Following the entry of *nolo* pleas and by agreement between counsel for these defendants and the Anti-Trust division, a consent decree was entered on July 9, 1940, in an equity suit (Civil Action No. 9-404) instituted in this Court on July 8, 1940, and covering the same matters charged in the indictment. Reference is made to the complaint in that action and to the consent decree entered therein with the same force and effect as if fully set forth herein, but the defendants do not concede the correctness of all of the allegations in the Government's complaint.

The present action was instituted by service of process by
72 a Deputy Marshal of the Western District on these defendants at Rochester, New York, on December 26, 1941. This was approximately a year and a half after the entry of the consent decree just mentioned and after much publicity had been given to the proceedings of the Anti-Trust Division against Bausch & Lomb. The parallel between the dates mentioned in the present complaint and in the complaint in the Government's equity case indicates that this action was

not instituted without an examination of the files of this Court and a study of the papers on file in the Government's proceedings. Yet, for reasons of their own, plaintiffs have seen fit to distort the earlier charges made by Government counsel and in important respects to make allegations which are directly contrary to statements made by those who were proceeding without hope of individual pecuniary benefit. Among these significant contradictions are the following, which furnish positive demonstration of the irresponsibility of plaintiffs' fantastic charges: 73

1. Paragraph "Fifth" of the present complaint alleges that the individual defendants Eisenhart, Bausch and Drescher are officers and directors of Carl Zeiss, Inc., as well as of Bausch & Lomb. Both in the indictment and in the complaint in the equity action it is alleged specifically that these individual defendants have official connection only with Bausch & Lomb. No claim was made by the Government that they were officers or directors of Carl Zeiss, Inc. The fact is that none of these individual defendants has or has ever had any connection with Carl Zeiss, Inc. 74

2. Paragraphs "Eighth" and "Ninth" of the present complaint allege that the defendant Bausch & Lomb, on or about April 28, 1921, and the defendant Carl Zeiss, Inc., from on or about December 11, 1925 (together with the individual defendants alleged to be, but not in fact, officers or directors of Carl Zeiss, Inc.), entered into a conspiracy to defraud the United States Government, in effect, by having whichever corporate defendant made bids for the sale of military optical instruments to the United States Government add 20% to the amount of such bids and, if successful, 75

pay such 20% to the other corporate defendant. Paragraph
76 "Ninth" makes it clear that plaintiffs rely upon written agreements dated on or about April 28, 1921, June 27, 1925, October 28, 1925, November 26, 1926, and December 24, 1926. Copies of agreements bearing the same dates were annexed to the complaint in the Government's equity suit in which the consent decree was entered, the dates of November 26, 1926 and December 24, 1926, applying to the same agreement. It is apparent, therefore, that this action is based on the same agreements which were alleged in the Government's equity suit. I respectfully ask that the copies of agreements annexed to the Government's complaint be deemed incorpo-
77 rated by reference herein, with the same force and effect as if fully set forth herein. I know of no other agreements bearing upon the subject matter. An examination of said agreements in the files of this Court shows that the allegations in the instant complaint with respect to them are false in the following material particulars:

(a) None of these agreements was made between Bausch & Lomb Optical Company and the defendant Carl Zeiss, Inc. All were made with Carl Zeiss, of Jena, Germany. Indeed, the agreement of April 28, 1921, was made more than four years before the incorporation of the defendant
78 Carl Zeiss, Inc. Carl Zeiss, Inc. had nothing to do with any of these agreements, nor has Bausch & Lomb had any dealings with Carl Zeiss, Inc. in connection with the subject matter of these agreements.

(b) Paragraphs "Eighth" and "Ninth" of the complaint allege in effect that the agreements referred to required Bausch & Lomb to add 20% to all bids which it made to the

United States Government on military optical instruments. No such provision or requirement is included in the agreements. Yet the damages claimed in this case in astronomical amounts are predicated upon the existence of such a requirement in the agreements and the exaction by Bausch & Lomb, pursuant to such a requirement, of 20% on all bids made by it to the United States Government, with the use by defendants of false and fraudulent documents to obtain payment from the United States. The 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by Bausch & Lomb to the United States Government. 79

Accordingly, it appears from the papers on file in this Court in connection with the proceedings by the Government (the theoretical partial beneficiary of plaintiffs' action) that the charges in this complaint are untrue in material particulars. The fundamental basis of this action, the Zeiss agreements, wholly fail to support the charges made. 80

B.

Not only are material allegations of the complaint shown to be false by reference to the records of this Court and the statements heretofore made, but the charges are utterly false in fact. There was not only no requirement in the agreement between Bausch & Lomb and Carl Zeiss, of Jena, that Bausch & Lomb should inflate its bids on military optical instruments to be supplied to the United States Government by 20%, or any other amount, to be paid to Carl Zeiss, of Jena, but there was no such inflation of bids. The price to be charged to the United States Government by Bausch & Lomb on military optical instruments manu- 81

factured by it for the Government was decided upon by
82 Bausch & Lomb alone without the participation or consent of any other organization. Bids made by Bausch & Lomb to the United States Government for such military optical instruments did not include 20% or any other artificial sum to be paid by Bausch & Lomb to Carl Zeiss, Inc., as charged in the complaint. The only payments made by Bausch & Lomb were the royalty payments provided for in the agreements, and are not material here. These did not exceed 7%, and, in any event, were paid to Carl Zeiss, of Jena, and not to Carl Zeiss, Inc. No possible claim of fraud is or could be made in connection with such payments.

83 In order to assist in the development of new and improved military optical instruments for the United States Government, sample instruments of foreign manufacture have occasionally been imported for examination and testing. Since Bausch & Lomb had manufacturing rights under designs and patents of Carl Zeiss, of Jena, for such equipment in the United States, the Army and Navy generally contracted with Bausch & Lomb for sample Zeiss military optical instruments. In such cases, the prices quoted by Carl Zeiss, of Jena, to Bausch & Lomb were determined independently by Carl Zeiss, of Jena, and the contract prices between the Army and Navy and Bausch & Lomb were determined in-
84 dependently by the latter, Bausch & Lomb assuming responsibility for the satisfactory character and performance of the instruments. Bausch & Lomb paid Carl Zeiss, of Jena, nothing beyond the net amount of its quotations for these instruments. On one occasion, in 1927, a contract was made between the United States Government and N. V. Nederlandsche Instrumenten Compagnie, of Venlo, Holland, a

subsidiary of Carl Zeiss, of Jena, for the importation of a sample military optical instrument. The contract price included 5% which was paid to Bausch & Lomb, as exclusive American licensee under the patents of Carl Zeiss, of Jena, covering this instrument. It was understood that Bausch & Lomb would assist the United States authorities in straightening out whatever questions might arise regarding the design and performance of the instrument and would undertake the manufacture of such further instruments of similar character as might be desired by the United States Government. 85

At no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party. The allegations in Paragraph "Eleventh" of the complaint are utterly false and untrue. 86

The complaint alleges in the language of the Statute (Paragraph "Twelfth") that at various undisclosed times the defendants presented for payment and approval to various officers of the Civil, Military and Naval Service of the United States, bids, claims, invoices, bills, vouchers, statements and accounts against the United States knowing that such documents were excessive, false, fictitious and fraudulent. I categorically deny those allegations. At no time did Bausch & Lomb, or anyone on its behalf, submit to any person or officer in the Civil, Military or Naval Service of the United States any claim upon or against the Government of the United States, or any department or office thereof, which was false, fictitious or fraudulent in any respect. I want to make it clear that the sweeping character 87

of this denial does not depend on the form of words of the
88 charge or of this answer. Bausch & Lomb is proud of its record of assistance to the military authorities of the United States and of the trust which has been reposed in it by them. Reflections on its integrity in such dealings are utterly without foundation. The fact that for a period it had certain agreements with Carl Zeiss, of Jena, which resulted in great benefits in the improvement of military optical instruments supplied to the United States Government and which were subsequently attacked as violating the anti-trust laws, furnishes no support for the charges so recklessly made in this suit.

89 These moving defendants settled the charges of violation of the anti-trust laws in good faith so that they could proceed with work necessary to national defense without interruption. In the course of those proceedings, a Special Assistant to the Attorney General stated in open court, after full investigation, that no charge of fraud was involved. These defendants believed at the time of the settlement, and now believe, that upon a trial of the charges of violation of the anti-trust laws they had defenses available to them but they considered that it was their duty to proceed with their work for national defense rather than to seek personal vindication. These and other defenses peculiar to this action,
90 such as the statute of limitations, and others, are still available to them and are reserved; but, regardless of the merits of the anti-trust proceeding, a matter which ought not now to be revived, it should require no formal trial of the issues to convince this Court that this action is utterly without merit or foundation in fact. In view of the facts and circumstances set forth in this and in the accompanying affidavits, these defendants are advised and believe that this action is

Affidavit of M. Herbert Eisenhart Read in Support of Order to Show Cause Dated January 6, 1942.

not maintainable, and they respectfully submit that they should not be required to interrupt their work for national defense to defend an action of this character. 91

I respectfully ask that the annexed order to show cause be signed so that the time of these moving defendants to answer will be extended during the consideration of this motion and so that, if necessary, the time for the motion under Rule 56 may be shortened and that, upon the return of this motion, the motion be granted in all respects.

(Sworn to by M. Herbert Eisenhart, January 5th, 1942.)

92

93

AFFIDAVIT OF CARL L. BAUSCH ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

94 SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

CARL L. BAUSCH, being duly sworn, deposes and says:

95 1. I am one of the individual defendants named herein and am Vice-President in Charge of Engineering and Research and a director of the Defendant Bausch & Lomb Optical Company.

2. I am a resident and inhabitant of the City of Rochester, New York, residing on Parsons Lane, in that City.

3. Service of process in this action was made upon me in Rochester, New York, on December 26, 1941, by a Deputy United States Marshal of the United States District Court for the Western District of New York.

96 4. I have read the foregoing affidavit of M. Herbert Eisenhart, sworn to January 5, 1942, in support of this motion. The statements therein are true and I adopt them as my own and ask the Court to consider said affidavit as my own in support of this motion, without repeating again all of the matters therein set forth.

(Sworn to by Carl L. Bausch, January 5th, 1942.)

AFFIDAVIT OF THEODORE B. DRESCHER ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

97

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF MONROE, *ss.*:

THEODORE B. DRESCHER, being duly sworn, deposes and says:

98

1. I am one of the individual defendants named herein and am Vice-President in Charge of Manufacture and a director of the defendant Bausch & Lomb Optical Company.

2. I am a resident and inhabitant of the City of Rochester, New York, residing at 99 Pelham Road, in that City.

3. Service of process in this action was made upon me in Rochester, New York, on December 26, 1941, by a Deputy United States Marshal of the United States District Court for the Western District of New York.

99

4. I have read the foregoing affidavit of M. Herbert Eisenhart, sworn to January 5, 1942, in support of this motion. The statements therein are true and I adopt them as my own and ask the Court to consider said affidavit as my own in support of this motion, without repeating again all of the matters therein set forth.

(Sworn to by Theodore B. Drescher, January 5th, 1942.)

AFFIDAVIT OF E. HERMAN ANTHES ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT

100 SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

E. HERMAN ANTHES, being duly sworn, deposes and says:

101 I am employed by Bausch & Lomb Optical Company, one of the defendants in this action. I reside at 2 Poplar Road, Larchmont, New York. Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity) is a large manufacturer of optical, ophthalmic and other products. Its manufacturing plant is located in Rochester, New York, in the Western District of New York, and its executive offices are located there. For several years I have been in charge of a small office conducted by Bausch & Lomb under its name at 30 Rockefeller Plaza, New York, N. Y. This assignment was due to the fact that I had been for some years directly connected with the Scientific Instruments Department of Bausch & Lomb at Rochester, New
102 York. The lease for this office was executed by Bausch & Lomb at its executive offices in Rochester, New York. The rent for the office is paid by Bausch & Lomb at Rochester, New York.

Among the products manufactured by Bausch & Lomb are scientific instruments (including balopticons, microprojectors, microscopes, binoculars, magnifying glasses, etc.)

and ophthalmic products and instruments (including perimeters, binocular ophthalmoscopes, light sense testers and other equipment for the examination of the eye). The office at 30 Rockefeller Plaza provides an operations base for the promotional and soliciting activities engaged in by the staff, but it is essentially a display room for the various products manufactured by Bausch & Lomb, some of which are enumerated above. Price lists and other literature of Bausch & Lomb make it clear that orders are not valid until accepted at the offices of the Company at Rochester, New York. When educational or scientific institutions, or dealers, or other prospective purchasers of scientific instruments desire to order such instruments from Bausch & Lomb the orders therefor are transmitted by me to Bausch & Lomb at Rochester, New York, for acceptance. In each year in the months of August and September, perhaps twelve or fifteen microscopes are, as a special favor, sold to resident medical students, and from time to time binoculars, magnifying glasses and other incidental scientific instruments may be sold to individuals out of the small inventory which is maintained at the office solely as a matter of accommodation for such individual customers.

103

104

The office staff, including myself, consists of sixteen employees of whom five constitute a clerical force under my immediate supervision. The clerical workers are paid out of a local bank account, which is also used for other petty cash disbursements. The average balance in this account is $2,000 or $3,000. The other employees whose base of operations is this office are paid by Bausch & Lomb from Rochester, and as to these employees I have no authority to hire or discharge. Excluding two employees whose function it is to demonstrate the display equipment maintained in the

105

showrooms, five of the staff are concerned with the scientific
106 instruments field. Their duties consist of promoting the use of Bausch & Lomb instruments, servicing instruments in use and general promotion activities with respect to scientific instruments. All substantial orders received in the course of their activities are forwarded to Bausch & Lomb for acceptance.

Two other employees who make their headquarters in this office are concerned with ophthalmic products and instruments and the annexed affidavit of Mr. Craytor sets forth their activities. It appears therefrom that except for occasional sales from the small inventory maintained in the
107 office as an accommodation, their branch of the office likewise exists largely for promotional and informational purposes.

Neither I nor any of the other employees of Bausch & Lomb at this office is an officer or director of Bausch & Lomb Optical Company. No directors' or stockholders' meetings of Bausch & Lomb are held at this office and all other normal corporate activities of Bausch & Lomb are carried on at its office in Rochester, New York. Neither I nor any of the other employees have any general administrative or discretionary supervision over the general business of Bausch & Lomb, nor is any general business of that Com-
108 pany transacted from such office. Several years ago, to facilitate sales to the Department of Public Education in the City of New York, I was given a power of attorney authorizing me to sign bids and contracts and to accept payments therefor. However, the regular procedure is for such contracts to be finally passed on at the office of the Company at Rochester, New York.

(Sworn to by E. Herman Anthes, January 5th, 1942.)

AFFIDAVIT OF RUSSELL E. CRAYTOR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 6, 1942.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

109

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

RUSSELL E. CRAYTOR, being duly sworn, deposes and says:

I am employed by Bausch & Lomb Optical Company of Rochester, New York. I reside at 167-10 Crocheron Avenue, 110
Flushing, New York.

I make my headquarters at the office at 30 Rockefeller Plaza, New York, N. Y., described in the annexed affidavit of Herman Anthes, but I am not under his supervision. I am directly responsible to Ben A. Ramaker, Sales Manager of Bausch & Lomb Optical Company, whose office is at Rochester, New York. My duties consist of visiting wholesale and retail users or prospective users of Bausch & Lomb ophthalmic products to promote the further use of such products. I travel extensively in the State of New York and in other nearby states in connection with these activities. One of the Bausch & Lomb employees who also makes his 111
headquarters at the office at 30 Rockefeller Plaza is engaged in activities similar to mine. From time to time, retailers give me orders for ophthalmic products, but no such orders are executed by me or at said office. In the case of all retail orders, the retail source of the order indicates to me what wholesaler to have the order placed through and the

order is then placed through such wholesaler. On occasion,
112 when the retail order is of such a character that it is not carried in wholesale stock and must be procured from the Bausch & Lomb factory, this same procedure of placing the order through the wholesaler is followed. I seldom have occasion to take direct orders from wholesalers, but on those occasions when I do take such orders, they are transmitted to Bausch & Lomb at Rochester for acceptance and execution. A small amount of representative ophthalmic equipment and instruments is maintained at the office at 30 Rockefeller Plaza. This is kept there for purposes of display and it is only on relatively infrequent occasions that parts
113 for and individual ophthalmic instruments may be sold directly from this small supply to individual customers, although such sales are made from time to time.

(Sworn to by Russell E. Craytor, January 5th, 1942.)

114

Notice of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 115

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that on the summons and complaint and upon the Marshal's returns herein, all filed in this Court, and upon the annexed affidavit of Karl A. Bauer, sworn to the 6th day of January, 1942, a motion will be made at a Stated Term for the hearing of Motions to be held 116
at Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order (a) under Rule 12 of the Rules of Civil Procedure dismissing this action and the complaint herein as against the defendant, Carl Zeiss, Inc., on the ground that the complaint fails to state a cause of action against this defendant upon which relief can be granted, and (b) granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground
that the complaint and affidavits herein show that there is 117
no genuine issue as to any material fact therein, and that the defendant is entitled to judgment as a matter of law, and for such other and further relief as may be just and proper, together with the costs of this motion.

Notice of Motion.

Dated, New York, N. Y., January 6, 1942.

Yours, etc.,

118

JOSHUA D. JONES,
of GIFFORD, WOODY, CARTER & HAYS,
Attorneys for Defendant, Carl Zeiss, Inc.,
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
New York, N. Y.

To:

119 EMANUEL THEBNER, Esq.,
Attorney for Plaintiffs,
111 John Street,
New York, N. Y.

120

Affidavit of Karl A. Bauer Read in Support of Motion.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 121

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

KARL A. BAUER, being duly sworn, deposes and says: I am president of the defendant, Carl Zeiss, Inc., and submit this affidavit in support of a motion made on behalf of said 122 defendant, Carl Zeiss, Inc., to dismiss the complaint herein and for a summary judgment in favor of the said defendant upon the grounds set forth in the notice of motion herein.

I have been advised by counsel and believe that on its face the complaint states no cause of action against the defendant, Carl Zeiss, Inc., as the statute under which this action purports to be brought does not cover or apply to transactions of the character falsely and erroneously alleged in the complaint.

The complaint should be dismissed and summary judgment granted in favor of the defendant, Carl Zeiss, Inc., under Rules 12 and 56 of the Rules of Civil Procedure be- 123 cause the complaint is made up largely of false and erroneous conclusions of law and fact, practically all of which are directly contrary to facts which this Court may take cognizance of as they are in the files of this court.

On March 26, 1940, the Anti-Trust Division of the Department of Justice procured the return of an indictment

(File C-107-109) in this court against the defendants in this action, including the defendant, Carl Zeiss, Inc., for al-
124 leged violations of the Sherman Anti-Trust Act and covering the same subject matter as is now covered by the complaint in this action. Reference is made to the original indictment in the files in this court for its scope and nature with the same force and effect as if fully set forth herein, although deponent does not concede the correctness of the charges therein against the defendant, Carl Zeiss, Inc.

The defendant, Carl Zeiss, Inc., originally pleaded not guilty to the indictment. On March 5, 1941, this defendant applied, through counsel, to Judge Libell in open court for leave to change its plea of not guilty to a plea of *nolo*
125 *contendere*. This application was consented to by the Honorable Samuel S. Isseks, Special Assistant to the Attorney General, representing the Anti-Trust Division of the Department of Justice. Judge Libell accepted the plea and fined the defendant, Carl Zeiss, Inc., the sum of $1,000.

Paragraph "Fifth" of the complaint alleges that the defendants, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, are officers and directors of Carl Zeiss, Inc. This is not the fact. Neither of these three men were ever at any time officers, directors or employees of Carl Zeiss, Inc. and were never at any time connected with the defendant, Carl Zeiss, Inc. in any capacity whatever.

126 Paragraph "Sixth" of the complaint alleges that Carl Zeiss, Inc. is engaged in selling periscopes, range finders, altimeters, boresights, bombsights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and control the firing of modern instruments of warfare, referred to as "military optical instruments". This is not a fact. Carl Zeiss, Inc. was incorporated in 1925 and never at any time in the history of

its existence did it deal or was it concerned with the sale of any such instruments as are listed or any other instrument of any sort that would answer the description of military optical instruments. Its business is altogether confined to the sale of cameras, telescopes, microscopes and optical instruments as used in civil businesses. It never at any time carried any such instruments. The only charge against the defendant, Carl Zeiss, Inc., made by the government in the Anti-Trust suit was that the defendant, Carl Zeiss, Inc., had declined from importing, selling or dealing in such instruments because of certain agreements made between Carl Zeiss, Jena, and Bausch & Lomb Optical Company. 127

Paragraphs "Eighth" and "Ninth" make it clear that plaintiffs rely upon certain written agreements dated on or about April 28, 1921, June 27, 1925, September 28, 1925, November 26, 1926 and December 24, 1926. Copies of these agreements were examined by me at the time of the filing of the indictment against the defendant, Carl Zeiss, Inc., and they were all made between Bausch & Lomb Optical Company and Carl Zeiss, Jena. The agreement of April 28, 1921, upon which plaintiffs particularly rely, was made four years before Carl Zeiss, Inc. was incorporated. Carl Zeiss, Inc. never at any time had anything to do with any of these agreements, nor has Carl Zeiss, Inc. had at any time any dealings with Bausch & Lomb Optical Company in connection with the subject matter of these agreements. 128 129

Since the entry of the plea of *nolo contendere* on March 5, 1941, neither the defendant, Carl Zeiss, Inc., nor any officer in connection with it has ever been approached by the Government of the United States in connection with the sale of military optical instruments by Bausch & Lomb Optical Company or any other concern in the United States

dealing with such instruments. No consent decree or other arrangements have been made by the defendant, Carl Zeiss,
130 Inc., with the government or any official on its behalf with respect to the dealings in such instruments. Deponent is informed and believes that the agreements under which the indictment of the Sherman Anti-Trust Act was brought are in the possession of Bausch & Lomb Optical Company or Carl Zeiss, Jena, and that copies are on file in the proceedings brought by the United States Government against Bausch & Lomb Optical Company and that these can be furnished to the court by the attorneys representing the other defendants on the hearing of this motion.

An examination of the agreements will disclose that
131 no such provisions are contained in the agreement as they are alleged in paragraphs "Eighth" and "Ninth" of the complaint.

Accordingly it appears from the papers on file in this court that the charges in this complaint are untrue in material particulars. The fundamental basis of the action that Carl Zeiss, Inc. was a party to the agreement or dealt in the material covered by the complaint wholly fails to support the charges made.

The absurdity of making Carl Zeiss, Inc. a party to this action is apparent from an examination of paragraph "Tenth", which alleges that between April 28, 1921 and
132 March 29, 1940, the defendants received payments from the United States for the sale and delivery of such military optical instruments, when in truth and fact the defendant, Carl Zeiss, Inc., never sold or delivered a military optical instrument to any person in the United States of America, including the United States Government. The same fact applies to paragraphs "Eleventh", "Twelfth", "Thirteenth", "Fourteenth" and "Fifteenth" as the defendant, Carl Zeiss,

Inc., never at any time bid for any government contract for the importation into the United States of any military optical instrument or its sale, manufacture and delivery in the United States. 133

Deponent respectfully submits that this action should be dismissed as to the defendant, Carl Zeiss, Inc.

(Sworn to by Karl A. Bauer, January 6th, 1942.)

134

135

Order to Show Cause Dated January 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

136 File No. Civ. 17-11

[SAME TITLE]

Upon the summons and complaint and Marshal's returns herein and upon the order to show cause, dated January 6, 1942, signed by Honorable Alfred C. Coxe, and the affidavits annexed thereto, and upon the annexed affidavit of Whitney North Seymour, sworn to the 14th day of January, 1942, and
137 the purported amended complaint, LET the plaintiffs herein and each of them show cause before this Court, at a Stated Term thereof to be held in Room 506, in the United States Court House, Foley Square, Borough of Manhattan, City, County and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered herein

1. As an additional ground for relief in connection with the motion made returnable by said order to show cause dated January 6, 1942, striking as sham and false
138 the complaint in this action pursuant to the provisions of Rule 11 of the Federal Rules of Civil Procedure and directing the institution of appropriate disciplinary action against the plaintiffs herein for wilful violation of said Rule.

2. (a) Determining that the purported amended complaint of the plaintiffs herein, of which a copy was de-

livered to the attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on January 13, 1942, is a nullity. 139

(b) Denying leave to the plaintiffs herein to amend their complaint in accordance with said purported amended complaint.

or in the event that said motion designated 2(a) and (b) be denied, and the complaint is amended in accordance with said purported amended complaint,

3. (a) Dismissing this action and the amended complaint herein as against the defendants Bausch & Lomb 140
Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York.

(b) Dismissing this action and the amended complaint herein as against the said defendants on the ground that the amended complaint fails to state a claim against these defendants upon which relief can be granted.

(c) Granting summary judgment to these defen- 141
dants upon the ground that the complaint and amended complaint, the affidavits annexed to said order to show cause dated January 6, 1942, and the affidavit hereto annexed show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment as against the plaintiffs as a matter of law,

and for such other and further relief as to this Court may seem just and proper, together with the costs of this action.

142 Sufficient cause appearing therefor, it is

ORDERED that the plaintiffs be and they hereby are stayed from taking any further proceedings in this action until final decision upon this motion and the motion made returnable by said order to show cause, dated January 6, 1942; and it is further

ORDERED that service of a copy of this order and the affidavit annexed thereto at the office of Emanuel Thebner, attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before

143 9:00 P. M. on January 14th, 1942, be deemed sufficient service hereof.

Dated, New York, N. Y., January 14th, 1942.

ALFRED C. COXE,
United States District Judge.

144

AFFIDAVIT OF WHITNEY NORTH SEYMOUR ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

145

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

146

I am an attorney and counsellor-at-law and a member of the firm of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action. This affidavit is submitted in support of a motion for the relief set forth in the annexed order to show cause by which this motion is made returnable.

On December 26, 1941, copies of the summons and complaint in this action were served upon the defendants Bausch & Lomb Optical Company (hereinafter sometimes called "Bausch & Lomb" for brevity), M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, at Rochester, New York. On January 6, 1942, an order to show cause was signed by Honorable Alfred C. Coxe bringing on a motion on behalf of these defendants to dismiss the complaint for improper venue, failure to state a cause of action and also for summary judgment in favor of the defendants. The motion was made returnable by said order to show cause on January

147

Affidavit of Whitney North Seymour Read in Support of Order to Show Cause Dated January 14, 1942.

16, 1942. I respectfully refer to said order to show cause
148 and the affidavits annexed thereto with the same force and effect as if they were fully set forth herein.

At 5:30 P. M. on January 13, 1942, a representative of the office of Mr. Emanuel Thebner, attorney for the plaintiffs, delivered to the office of my said firm a copy of a paper purporting to be an amended complaint in this action. A copy of said purported amended complaint is annexed hereto, and, without conceding the correctness of any of the statements made therein, I respectfully ask that it be considered upon this motion and upon the motions brought on by the earlier order to show cause as an admission by
149 the plaintiffs and for all purposes except as an amended complaint. As promptly as possible said purported amended complaint will be returned to the office of the attorney for the plaintiff with a notice, copy of which is annexed hereto, stating that said document is a nullity and does not comply with Rule 15(a) of the Federal Rules of Civil Procedure.

Plaintiffs apparently now recognize, as was demonstrated by the affidavits in support of the motion brought on by the said order to show cause, dated January 6, 1942, that the complaint in this action is false in material particulars and that the defendants' motion addressed to it must be granted. In an effort to avoid decision on that motion, plain-
150 tiffs have served a purported amended complaint, without obtaining leave of the Court. Said purported amended complaint was not properly served as an amendment of the complaint as of course under Rule 15(a) because it was served after the service of defendants' motion to dismiss and for summary judgment. Accordingly, plaintiffs have wholly failed to comply with the requirements of Rule 15(a)

and the purported amended complaint is a nullity and defendants are entitled to a decision to that effect.

151 Since no amendment of the complaint has been made or authorized, defendants' original motion to dismiss and for summary judgment will be heard on the return of the order to show cause dated January 6, 1942. It is of extreme importance to the defendants that this action should be finally disposed of as promptly as possible without further harassment or annoyance to them.

It is clear from the annexed form of purported amended complaint that the original complaint in this action is false in material particulars and that the signing of that complaint by the attorney for the plaintiffs under the circum-
152 stances is a direct violation of Rule 11 of the Federal Rules of Civil Procedure. The flagrant violation of that Rule by the plaintiffs herein, both of whom are members of the Bar of this Court, requires that the complaint should be stricken as sham and false under the Rule and that appropriate disciplinary proceedings should be instituted against the plaintiffs.

The plaintiffs should not be allowed to avoid the inevitable dismissal of the complaint by any proceedings on their part seeking to delay disposition of the motion to dismiss and for summary judgment. The language of the purported amended complaint varies the cause of action so completely
153 and it so plainly fails to state a cause of action against these defendants that even if an application for leave to amend were made, it must necessarily be denied. Accordingly, by this motion defendants seek not only a determination that the purported amended complaint is a nullity but also relief against any dilatory attempt on the part of the plaintiffs to avoid final adverse disposition of this litigation.

Even if the complaint were to be deemed amended (which
154 for the reasons stated would be improper), it is clear that it would have to be dismissed and summary judgment granted to defendants upon the grounds set forth in the order to show cause annexed hereto. Accordingly, that relief is sought in the alternative, but only in the event that grounds 2(a) and (b) of this motion are denied.

This motion should be made returnable concurrently with the motion brought on by said order to show cause dated January 6, 1942, so that final disposition of the litigation may be had. Convenience of the Court indicates that both motions should be considered together, since the papers
155 on both motions must be examined on each. In view of the fact that the purported amended complaint was only served upon my firm on January 13, 1942, it is impossible to give the ordinary notice of motion and still have this motion returnable concurrently with the motions brought on by said order to show cause dated January 6, 1942. Accordingly, I respectfully request that the annexed order to show cause be signed, so that said motions may be heard and determined together on the return day of the original order to show cause herein. I also request that such order to show cause contain a stay of further proceedings on the part of the plaintiffs pending the return of this motion, so that no
156 further steps may be taken on their part to avoid final decision in the litigation. The moving defendants do not waive their objections to the bringing of this action in this District. On the contrary they insist upon that objection and this motion is made to prevent evasion by plaintiffs of prompt decision of that question and the other questions presented by this motion made returnable by the order to show cause dated January 6, 1942. Ground 1 of the present

motion is an additional ground for dismissal which the Court is asked to consider in connection with the defendants' earlier motion. The violation of Rule 11 by plaintiffs, to which attention is called by that ground, has now become so apparent that it ought not to be overlooked by the Court. 157

No previous application has been made for the relief sought herein.

WHEREFORE I respectfully request that an order to show cause in the form annexed hereto be signed and that this motion be granted so far as may be appropriate.

(Sworn to by Whitney North Seymour, January 14th, 1942.) 158

AMENDED COMPLAINT ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14th, 1942 HAS BEEN PRINTED HEREIN AT PAGE 78.

159

Notice of Rejection.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

160

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that the undersigned hereby return and reject as a nullity the annexed purported amended complaint in this action because said purported amended complaint and the service thereof do not comply with Rule 15(a) of the Federal Rules of Civil Procedure in that said purported amended complaint was not served before a responsive pleading to the complaint was served and neither leave
161 of the Court nor written consent of the adverse party was obtained, and upon the further ground that said purported amended complaint fails to comply with the requirements of the Federal Rules of Civil Procedure in any respect.

Dated, New York, N. Y., January 14, 1942.

Yours, etc.,

SIMPSON THACHER & BARTLETT,
Attorneys for Defendants,
Bausch & Lomb Optical Company,
M. H. Eisenhart, Carl L. Bausch and
162 Theodore B. Drescher,
Office and Post Office Address,
120 Broadway,
Borough of Manhattan,
New York, N. Y.

To:

EMANUEL THEBNER, ESQ.,
Attorney for Plaintiffs,
111 John Street,
New York, N. Y.

Affidavit of Service of Jack Kemp Busby.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
File No. Civ. 17-11

163

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JACK KEMP BUSBY, being duly sworn, deposes and says:

I am an attorney and counsellor at law associated with the firm of Simpson Thacher & Bartlett, attorneys for the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action; that I am over the age of twenty-one years and reside at The Hampshire House, 150 Central Park South, in the Borough of Manhattan, City, County and State of New York, and that I am not a party to this action; that on the 14th day of January, 1942, at or about 1:20 o'clock in the afternoon of that day, I served personally upon Emanuel Thebner, attorney for plaintiffs in this action, at his office at No. 111 John Street, in the Borough of Manhattan, City, County and State of New York, an original Notice of Rejection, of which a true copy is hereto annexed, to which was attached a copy of a purported amended complaint of the plaintiffs in this action, said copy being the same paper which was delivered by a representative of the office of Mr. Emanuel Thebner at the office of Messrs. Simpson Thacher & Bartlett at or about 5:30 P. M. on January 13, 1942, by personally giving to and leaving with the said Emanuel Thebner the aforesaid original Notice of Rejec-

164

165

tion herein with the aforesaid copy of purported amended complaint annexed thereto.

166 Deponent further says that at the same time and place as aforesaid he served personally upon said Emanuel Thebner the order to show cause of Hon. Alfred C. Coxe herein, dated January 14, 1942, to which was annexed the affidavit of Whitney North Seymour, verified January 14, 1942, a true copy of the aforesaid purported amended complaint and of the aforesaid Notice of Rejection, by personally exhibiting to the said Emanuel Thebner the aforesaid order to show cause, affidavit of Whitney North Seymour, copy of purported amended complaint and copy of Notice of Rejection, and personally leaving with the said Emanuel Thebner true

167 copies thereof.

(Sworn to by Jack Kemp Busby, January 14th, 1942.)

168

Order to Show Cause Dated January 14, 1942.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

169

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

170

Defendants.

On the summons and complaint herein and upon the Marshal's returns herein, the notice of motion herein made by the defendant, Carl Zeiss, Inc., dated January 6, 1942, returnable the 16th day of January, 1942, for an order under

171

Order to Show Cause Dated January 14, 1942.

Rule 12 of the Rules of Civil Procedure dismissing the action and the complaint herein as to the said defendant,
172 Carl Zeiss, Inc., on the ground that the complaint fails to state a cause of action and granting summary judgment under Rule 56 of the Rules of Civil Procedure, and upon the annexed affidavit of Joshua D. Jones, verified the 14th day of January, 1942, and the purported amended complaint herein;

LET the plaintiffs herein and each of them show cause before this Court at a Stated Term for the hearing of motions to be held in Room 506 of the United States Court House, Foley Square, in the Borough of Manhattan, City, County
173 and State of New York, on the 16th day of January, 1942, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be entered herein granting to the defendant, Carl Zeiss, Inc., the relief prayed for in the said notice of motion herein, dated January 6, 1942, and as an additional ground for relief in connection with said motion,

(a) Striking out as sham and false the purported amended complaint and directing the institution of appropriate disciplinary proceedings of the plaintiffs herein for wilful violation of the Rules of Civil Procedure of this Court, and

174 (b) Directing the proposed amended complaint of the plaintiffs herein, of which a copy was delivered to the attorneys for the defendant, Carl Zeiss, Inc., on January 13, 1942, is a nullity, and

(c) Denying leave to the plaintiffs herein to amend the complaint in accordance with the said purported amended complaint, and

(d) In the event that the said motion be denied and that the plaintiffs' complaint be amended in accordance with the proposed amended complaint,

175

1. Dismissing the amended complaint herein under Rule 12 of the Rules of Civil Procedure on the ground that the said amended complaint fails to state a cause of action against the defendant, Carl Zeiss, Inc., and

2. Granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground that the said amended complaint shows that there is no genuine issue as to any material fact therein and that the defendant, Carl Zeiss, Inc., is entitled to judgment as a matter of law, and for such other and further relief as may be just and proper, together with the costs of this motion, and sufficient cause appearing therefor, it is

176

ORDERED that the time of the defendant, Carl Zeiss, Inc., to answer the complaint or amended complaint herein be and the same hereby is extended to and including ten days after the entry of an order disposing of this motion; and it is further

ORDERED that service of a copy of this order and the affidavit annexed, at the office of Emanuel Thebner, attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before 6:00 P. M. January 14, 1942, be deemed sufficient service hereof.

177

Dated, New York, N. Y., January 14, 1942.

ALFRED C. COXE,
United States District Judge.

AFFIDAVIT OF JOSHUA D. JONES ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14, 1942.

178 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOSHUA D. JONES, being duly sworn, deposes and says:

179 I am an attorney associated with Gifford, Woody, Carter & Hays, the attorneys for the defendant, Carl Zeiss, Inc., and I have personal charge of this action. This action was commenced against the defendant, Carl Zeiss, Inc., by the filing of the summons with the Clerk of this Court on December 17, 1941, and the service of a summons and complaint on the defendant, Carl Zeiss, Inc., on December 31, 1941.

Thereafter on January 7, 1942, I prepared and caused a notice of motion to be served on Emanuel Thebner, Esq., the attorney for the plaintiffs, dated January 6, 1942, returnable before this Court on January 16, 1942, asking for an order dismissing the complaint herein on the ground that it
180 did not state a cause of action against the defendant, Carl Zeiss, Inc., and asking for summary judgment in favor of the defendant, Carl Zeiss, Inc., under Rule 56 of the Rules of Civil Procedure on the ground that there was no genuine issue or any material fact in dispute.

To this notice of motion was attached the affidavit of Karl A. Bauer, president of Carl Zeiss, Inc., verified January 6, 1942, in which it was stated that the material allegations

of the complaint to the effect that the individual defendants were officers of Carl Zeiss, Inc.; that Carl Zeiss, Inc. had
181 entered into a conspiracy with Bausch & Lomb Optical Company to charge the United States Government excessive prices on the sale of military optical instruments and had collected excessive prices for such materials and filed bills, vouchers and invoices which were false and fictitious, which allegations were absolutely false, and that Carl Zeiss, Inc. never at any time manufactured, sold, delivered or dealt in military optical instruments of any kind and that they had never at any time sold or did business with the United States Government in such instruments, and that this was disclosed in a proceeding brought by the United States
182 Government in this Court against Bausch & Lomb Optical Company and the defendant, Carl Zeiss, Inc., for violation of the Sherman Anti-Trust Act.

The original notice of motion, dated January 6, 1942, and returnable January 16, 1942, with the affidavit of Karl A. Bauer attached thereto was duly filed with the Clerk of this Court for the hearing of the motion on the 16th.

Yesterday, shortly after 5:00 o'clock, there was left at the office of Gifford, Woody, Carter & Hays, what purports to be an amended complaint, undated and unverified, correcting the statements contained in the original com-
183 plaint, the falseness of which had been sworn to in the affidavit of Karl A. Bauer, annexed to the notice of motion.

The plaintiffs have failed to serve any opposing affidavits in opposition to defendant's motion for summary judgment and have served what purports to be an amended complaint, the allegations of which in all respects establish the truth of the statements made in the affidavit of Karl A.

Affidavit of Joshua D. Jones Read in Support of Order to Show Cause Dated January 14, 1942.

Bauer that the allegations of the original complaint are
184 false.

The purported amended complaint does not correct the defects in the original complaint, for which it is claimed that it should be dismissed on the ground that it does not state a cause of action. In addition to that, it conclusively establishes that there is no issue to be determined in this action and that summary judgment should be granted in favor of the defendant, Carl Zeiss, Inc., as asked for in the notice of motion, dated January 6, 1942.

Deponent respectfully submits that there is no procedure under Rule 15 of the Rules of Civil Procedure under which
185 a plaintiff can serve an amended complaint in answer to a motion for summary judgment; and further, that under Rule 11 of the Rules of Civil Procedure, the attorney for the plaintiff is subject to appropriate disciplinary action for filing pleadings obviously containing matter which he knows not to be correct and at least would never have been alleged if there had been a casual examination of the papers on file in this Court which formed the basis of the action against the defendant, Carl Zeiss, Inc.

Attached hereto and marked Exhibit "A" is a copy of the proposed amended complaint received on January 13, 1942.

No previous application for similar relief has been made.

186

WHEREFORE it is respectfully requested that an order to show cause in the form annexed hereto be signed bringing this motion for a hearing on January 16, 1942 at the same time and place as the motion, dated January 6, 1942, is returnable, and further extending the time of the defendant, Carl Zeiss, Inc., to answer the complaint or the proposed

Affidavit of Joshua D. Jones Read in Support of Order to Show Cause Dated January 14, 1942.

amended complaint herein until ten days after an order upon said motion; and further ordered that service of a copy of this order and the affidavit and exhibit annexed thereto at the office of Emanuel Thebner, Esq., the attorney for the plaintiffs, 111 John Street, Borough of Manhattan, City, County and State of New York, on or before 6:00 o'clock on January 14, 1942, shall be deemed sufficient service thereof. 187

(Sworn to by Joshua D. Jones, January 14th, 1942.)

AMENDED COMPLAINT ANNEXED TO ORDER TO SHOW CAUSE DATED JANUARY 14TH, 1942 HAS BEEN PRINTED HEREIN AT PAGE . 188

SIMILAR NOTICE OF REJECTION, DATED JANUARY 14, 1942, HAS BEEN PRINTED HEREIN AT PAGE 54.

189

Opposing Affidavit of Emanuel Thebner.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

190

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

EMANUEL THEBNER, being duly sworn, deposes and says: I am one of the plaintiffs in the above entitled action and also the attorney of record for the plaintiffs.

This affidavit is made in answer to the motion of the de-
191 fendants by order to show cause dated January 14, 1942. The defendants seek by their application: (1) An order striking out the complaint as sham and false; (2) an order directing the institution of disciplinary proceedings against the plaintiffs; (3) declaring the amended complaint to be a nullity; and (4) denying leave to amend, if leave be necessary, and in the alternative, if the amendment of the complaint be deemed proper, then that the Court enter an order, (a) dismissing the action of the amended complaint on the ground that the venue is improper; (b) that the amended complaint does not state a cause of action; and (c) granting summary judgment to the defendants on the
192 ground that there is no genuine issue and no cause of action as to any material fact.

The original complaint in this action filed in this Court on December 17, 1941 and the amended complaint filed January 14, 1942 are neither sham nor false. The ultimate facts and conclusions therein set forth are amply supported by the indictment against the defendants herein by the United

States Grand Jury in and for the Southern District of New York, at the March 1940 Term (C. 107-169); the two bills of particulars filed by the United States Attorney General in said criminal action; and the complaint in equity of the United States Government; and the consent decree entered in said action now on file in this Court (Civil 9-404), all of which are made a part of this affidavit. 193

Revised Statutes of the United States §§3490-3494 (31 U. S. C. 231-235) specifically permit the plaintiffs as citizens to institute and prosecute this action. This action was in fact instituted by plaintiffs pursuant to said statutes and in absolute good faith. The plaintiffs verily believe and are of the opinion that by reason of the unlawful acts of the defendants, the defendants did, in fact, defraud the Government of the United States of large sums of money, as deponent verily believes. 194

Deponent did not wilfully violate any of the provisions of the Federal Rules of Civil Procedure in any way, shape or form, and in particular Rule 11. The plaintiffs here and now state unequivocally that the charge of the defendants that deponent signed the complaint which is alleged was false in material particulars and that deponent knew it to be false, is totally untrue, unfair and unwarranted; and the request for the institution of disciplinary action against deponent and the plaintiffs is equally unfair and unwarranted.

195

Plaintiffs respectfully submit that the defendants' contention that the amended complaint is a nullity is totally without substance and merit. Rule 15A of the Federal Rules of Civil Procedure entitles the plaintiffs to serve an amended complaint once as of course within twenty days after service of the complaint.

Opposing Affidavit of Emanuel Thebner.

The records of this Court show that the original complaint was served on Bausch & Lomb and the individual
196 defendants on December 26, 1941, and on Carl Zeiss, Inc., on December 31, 1941. Since the plaintiffs had twenty days thereafter to amend their complaint, once as of course, pursuant to said Rule 15A, the time within which to do such act did not expire until January 15th and January 20th, 1942, respectively.

It is conceded that the amended complaint was duly served on January 13th, 1942 and was duly filed in the Clerk's office of this Court on January 14, 1942.

The motions of the defendants are not "responsive pleadings" within the provisions of Rule 7A. Therefore, the
197 plaintiffs had the clear right to amend their complaint, once as of course, without obtaining the prior leave of this Court. This was recognized by Mr. Seymour, defendant's counsel by requesting an extension of time to answer and by the order to show cause dated January 6, 1942 containing such relief. Mr. Seymour there virtually admits that the defendants, in their application, have not submitted any responsive pleading. The only responsive pleading to a complaint allowed under Rule 7A, is an answer, and no answer had been served.

It is therefore clear that the plaintiffs were within their rights in serving the amended complaint and that the service
198 thereof was duly made pursuant to the Federal Rules aforesaid.

Plaintiffs further respectfully submit that in view of the proper service of the amended complaint in this action, the defendants' original motions under the order to show cause of January 6th, 1942, become academic and should not now be entertained by this Court.

Opposing Affidavit of Emanuel Thebner.

Defendants are not entitled to the alternative relief under the order to show cause obtained by the defendants on January 14th, 1942, being the relief they had applied for by order to show cause of January 6th, 1942. 199

Rule 56c of the Federal Rules of Civil Procedure provides that a motion for summary judgment must be served at least ten days before the time specified for the hearing.

Plaintiffs submit that this statutory time allowed the opposition until the hearing of the motion for summary judgment may not be cut down without the consent of the adverse party. The plaintiffs do not consent to any lesser time than that provided for in Rule 56C and do not consent to such a hearing now.

It is respectfully submitted that plaintiffs are entitled under the Rules of Civil Procedure §§26, 31 and 37, to apply for examination before trial, discovery and inspection and pre-trial relief even before answer. 200

The granting of the ex-parte stay in the order of January 14, 1942 without notice to the plaintiff and without giving them an opportunity to be heard was prejudicial to them under the aforesaid respects.

The unfairness of Mr. Seymour in making the charges is further manifest by the fact in obtaining the order to show cause, he also procured a stay of this Court on the part of the plaintiffs from taking any further proceedings in this action until the final decision upon this motion and the prior motion made by the order to show cause dated January 6th, 1942. 201

It is obvious that the effect was to prevent the plaintiffs and deponent from properly preparing to meet the prior motion, which is also renewed on this application as for alternative relief to dismiss the complaint and for summary judgment.

The plaintiffs, therefore, request that the stay be vacated and that should this Court entertain the application for alternative relief, notwithstanding the service of the amended
202 complaint, that the hearing of that application be set for a date sufficient in advance to give deponent an opportunity to properly prepare to oppose such application.

The moving papers on this application are entirely inaccurate in the statements charging falsity to certain of the allegations of the complaint. In reality it will be noted from a reading of the affidavit of Mr. Herbert Eisenhart, verified January 5, 1942, submitted on the pending prior motion, that they raise issues of fact and give their own version which is contrary to the matters alleged in the
203 indictment.

One of the attacks upon the alleged falsity of the complaint is that it appears from the face of the agreements between the defendants Bausch & Lomb Optical Company and Carl Zeiss, Jena, Germany that Carl Zeiss, Inc. is not a party thereto.

As a matter of fact, however, and as a matter of law, it is respectfully submitted that that fact would not prevent proof that other parties not named in the contract, were or became liable thereon even if the cause of action were based upon the contract, which is not the fact. Plaintiffs' cause of action as stated before and alleged in the complaint, is
204 for fraud practiced on the United States Government. That could be established from the other allegations of the complaint even without the allegations of the conspiracy. In other words, plaintiffs' theory of the case under T. 31 (U. S. C. §§231-235) was two-fold. The fraud committed on the government may be by making or causing to be made of false claim against the government or obtaining the pay-

ment or allowance of any claim, knowing it to be false or fraudulent. Both these alternatives were set forth in the complaint.

205 The principal attack upon the complaint is that Carl Zeiss, Inc. was not physically a party to the contracts between Bausch & Lomb Optical Company and Carl Zeiss, Jena, Germany. The exclusion from the original complaint of reference to Carl Zeiss, Jena, Germany was because there was an absolute identity between Carl Zeiss, Inc. and Carl Zeiss, Jena, Germany, which could be proven by factual evidence as appears from the indictment aforesaid as a matter of fact and as a matter of law, it would appear to have been unnecessary because the charge in the complaint was that of tort and Carl Zeiss, Inc. as a tort feasor. That 206 in so doing it was an agent is entirely immaterial, as an agent is liable for tort as well as the principal.

As to the factual matter, deponent desires to call to the attention of the Court the following which are not mentioned in the moving affidavits. Paragraph "7" of the indictment states:

> "Whenever it is hereinafter alleged in this indictment that the defendant Zeiss did do, or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name or, or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc." 207

Insofar as anything stated in the indictment relates or tends to charge a violation of the Sherman Anti-Trust Act or the Wilson Tariff Act by the involvement of interstate or foreign commerce, it is principally in that connection that Carl Zeiss, Jena, Germany had a bearing in the indictment.

Opposing Affidavit of Emanuel Thebner.

Insofar as this action is concerned, Carl Zeiss, Inc., which was and is to all intents and purposes, Carl Zeiss, Jena,
208 Germany, is the only party that was necessary to plead in this action as a tort feasor.

In this connection, we call attention to the following statements in the indictment:

Par. 4: "For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about
209 December 11th, 1925, and existing by virtue of the laws of the State of New York, *which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss.*" (Italics ours.)

Par. 19: "* * * Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world."

210 The Court will note according to the preamble first above mentioned this must be construed as well that Carl Zeiss, Inc. manufactured and distributed.

Par. 11: "Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government * * *"

Opposing Affidavit of Emanuel Thebner.

Par. 14: "* * * Bausch & Lomb and Zeiss (meaning as well Carl Zeiss, Inc., as per preamble) have been engaged in importing military optical instruments into the United States through the Port of New York in the said Southern District of New York." (Matter in parentheses ours.) 211

In paragraph "17" of the indictment it is alleged that the agreement of April 28, 1921 was supplemented on June 27, 1925 and again on October 28, 1925 and further states as follows:

"To modify the provisions of paragraph 2 with respect to royalty payments and to modify paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss (meaning Carl Zeiss, Inc. as per preamble) could make quotations on military optical instruments, the eventual designation of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed upon by Zeiss (meaning Carl Zeiss, Inc. as per preamble) and Bausch & Lomb. Bausch & Lomb and Zeiss (meaning Carl Zeiss, Inc. as per preamble) agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a mark-up over the bidders regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party." (Matter in parentheses ours.) 212 213

The modifications of the agreement of 1921 are further set forth in 17-d of the indictment, which paragraph concludes as follows:

214

> "Notwithstanding this change in the form of April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraph 3 and 9 of the April 28th, 1921 agreement as supplemented in 1925."

These new modification agreements were made on November 26th, 1926 and on December 24th, 1926, respectively, which period of time is approximately one year after the incorporation of Carl Zeiss, Inc.

215 As the Court will undoubtedly read the indictment in connection with this affidavit, it is not necessary to continue further quoting therefrom.

A reference to the amended complaint by comparison with the original, indicates except for a single correction which was an inadvertent error in stating that the three individual defendants who it is conceded were officers and directors of Bausch & Lomb, Inc., was mistakenly stated to be also officers and directors of Carl Zeiss, Inc. All of the other additional allegations are in the nature of evidentiary matters that could have been proven upon the trial under the original complaint, but out of abundance of caution and to meet the hypercritical attack of the com-
216 plaint, it was deemed better to serve an amended complaint. The basic cause in all respects to wit: the conspiracy and the fraud and the parties are all the same.

In substance, the amended complaint by addition and changes were to the following effect:

(1) Wherever Carl Zeiss, Inc. was referred to as having

agreed, we now allege it to be Carl Zeiss, Jena, Germany, the party mentioned on the face of the agreement.

(2) The showing of the complete control and domination of Carl Zeiss, Inc. by Carl Zeiss, Jena, Germany. 217

(3) The allegation that the acts and matters referred to in the complaint were carried out through the instrumentality and agency of Carl Zeiss, Inc., in substance the same as in the indictment.

A change was also made instead of whereas it is alleged in the original complaint that all bids would contain a mark-up up to 20% over the regular price, it is alleged in the amended complaint in paragraph "11" that 218

> "A sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of United States, the said sum of money to be paid irrespective of whether the fees of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss."

The indictment has a similar allegation (paragraph 17-b).

Mr. Eisenhart in his affidavit of January 5, 1942 at page 8 states that Judge Goddard had asked Mr. Isseks whether any charge of fraud was involved, Mr. Isseks replied as follows: 219

> "No, sir, there is no charge of fraud against the defendants in connection with the acts complained of in the indictment."

This isolated sentence does not truly represent the position of the Assistant United States Attorney General.

220 Mr. Isseks, however, upon further question by the Court as to why he should impose the maximum fine, shows that he meant by the statement, "that there was no fraud involved." Mr. Isseks said:

> "Your Honor I think the acts are sufficiently culpable, although not involving acts of coercion or threats to warrant the imposition of the maximum fine. This continued from 1921 to date, and the penalty imposed, if the penalty imposed by the maximum fine will be small compared to what the government would consider
> 221 the defendant Bausch & Lomb has derived as benefits, and of course its officers, and I think that the reason itself is sufficient for your Honor in imposing the maximum fine."

The statement in Mr. Eisenhart's affidavit at page "9" charging that plaintiffs have seen fit to distort the earlier charges made by the government counsel and then proceeding to refer to the fact that Carl Zeiss, Inc. was not a party to the contract and at page "11" stating that Bausch & Lomb had no dealings with Carl Zeiss, Inc. manifests that defendants were attempting to get what may be said as "snap judgment" on the technicality that Carl Zeiss, Inc. was not,
222 on the face of the contract, a party thereto.

Without repeating what has already been said in that connection, showing that the criticism is not justified, there is presented questions of fact both as to the liability of Carl Zeiss, Inc. and as to whether Bausch & Lomb had dealings with Carl Zeiss, Inc. in connection with the matters alleged in the complaint. The indictment clearly supports the allegations of the complaint in both these respects.

Opposing Affidavit of Emanuel Thebner.

Mr. Eisenhart in his affidavit at page "10" in paragraph "2", says:

"Paragraph '8' and '9' of the present complaint alleged that defendant Bausch & Lomb on or about April 28, 1921 and the defendant Carl Zeiss, Inc. from on or about December 11, 1925 (together with the individual defendants alleged to be, but not in fact officers and directors of Carl Zeiss, Inc.), entered into conspiracy, etc." 223

The allegation of paragraph "8" of the complaint in that connection is as follows:

"The defendant Bausch & Lomb Optical Company from on or about April 28, 1921 and the defendant Carl Zeiss, Inc. from the date of its incorporation, on or about December 11, 1925 and the individual defendants since the time they became officers and directors of said corporation * * *" 224

In conclusion, plaintiffs respectfully state that their position herein taken with regard to the consideration of the motion for summary judgment at this time is not in order to avoid a decision either as to the sufficiency of the original or as to the sufficiency of the amended complaint nor as to the passing upon the motion for summary judgment, but each be taken up in due order according to the course and practice of this Court. 225

The foregoing matters in this affidavit were primarily addressed to the motion made by the defendant Bausch & Lomb Optical Company and the individual defendants. A like motion has also been made by the defendant Carl Zeiss,

Inc. To avoid duplication, we respectfully ask that this affidavit be read in opposition to both of said motions with
226 the same force and effect as if a separate affidavit was filed in the Carl Zeiss, Inc.'s motion.

WHEREFORE, deponent respectfully prays as follows:

1. That the motions of all the defendants instituted by orders to show cause dated January 14th, 1942 be denied in all respects.

2. That the motions of all the defendants made by order to show cause dated January 6, 1942 and by notice of motion dated January 6, 1942, be denied in all respects.
227

3. That the stay contained in the order to show cause dated January 14, 1942 be vacated in all respects.

4. That the amended complaint be declared to have been properly and timely served and is a valid and subsisting pleading on the part of the plaintiffs herein.

5. In the event that the Court should not see fit to deny the motion for alternative relief under the orders to show cause of January 14, 1942 which was originally made by the defendants under the order to show cause dated Jan-
228 uary 6th, 1942 and on notice of motion dated January 6, 1942, that the hearing be deferred for a reasonable time so that the plaintiffs would have an opportunity to prepare their opposition to said motion.

(Sworn to by Emanuel Thebner, January 15th, 1942.)

Opposing Affidavit of Murray Brensilber.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK 229

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MURRAY BRENSILBER, being duly sworn, deposes and says: I am one of the plaintiffs in this action.

That I have read the annexed affidavit of Emanuel Thebner and that the same is true in all respects. That I reiterate the statements therein made as if herein repeated verbatim. 230

(Sworn to by Murray Brensilber, January 15th, 1942.)

231

Amended Complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

232

[SAME TITLE]

Plaintiffs complaining of the defendants, for their amended complaint, respectfully allege as follows:

First: That the plaintiffs are and at all times herein mentioned were, and each of them is a citizen of the United States of America and of the State of New York, and each of them is a resident of the State of New York.

233

Second: The plaintiffs bring this action in behalf of the United States of America and in their own behalf by virtue of and pursuant to United States Revised Statutes Sections 3490-3494 (31 U. S. C. 231-235). The matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

Third: Upon information and belief that the defendant, Bausch & Lomb Optical Company, hereinafter called Bausch & Lomb is a corporation organized and existing under the Laws of the State of New York and has maintained and
234 now maintains an office and place of business in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within said District.

Fourth: Upon information and belief, Carl Zeiss, Inc. is a corporation organized and existing under the Laws of the State of New York and has maintained and now main-

tains its principal place of business and office in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within said District. 235

Fifth: Upon information and belief, Carl Zeiss (hereinafter called Zeiss), is a corporation or association existing under and by virtue of the Laws of Germany, and has its principal place of business in Jena, Germany, and for many years has been engaged in the business of manufacturing military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world.

Sixth: Upon information and belief, the defendant Carl Zeiss, Inc. is a wholly owned subsidiary of Carl Zeiss, Jena, Germany, and is dominated. controlled and operated by the said Carl Zeiss, Jena, Germany. 236

Seventh: Upon information and belief, Carl Zeiss, Jena, Germany, has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York through the instrumentality and agency of Carl Zeiss, Inc., a New York corporation.

Eighth: Upon information and belief, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, are and each of them is and was during the greater part of the times herein mentioned, associated with Bausch & Lomb, and has held and at the present time hold the position of an officer or director of said corporation and were and are actively engaged in the management, direction and control of the affairs and policies of said corporation. 237

Ninth: Upon information and belief that the said Bausch & Lomb and Carl Zeiss, Jena, Germany, are and were at the
238 times herein mentioned engaged in the business of Manufacturing and selling various instruments, among others, periscopes, range finders, altimeters, bore-sights, bomb-sights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and control the firing of modern instruments of warfare, hereinafter referred to as "military optical instruments".

Tenth: Upon information and belief the United States Government purchased such military optical instruments for use on battleships, cruisers and submarines, and for use
239 with aircraft and artillery.

Eleventh: Upon information and belief the defendant, Bausch & Lomb and Carl Zeiss, Jena, Germany, from on or about April 28, 1921, and the defendant, Carl Zeiss, Inc., from the date of its incorporation, on or about December 11, 1925, and the individual defendants since the time they became officers or directors of said Bausch & Lomb, together with other persons to the plaintiffs unknown, have been continuously engaged during and throughout the periods of time aforesaid, and up to and on about March 29, 1940, in an unlawful combination and conspiracy to sup-
240 press and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of

sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments; and that in consideration of the obligations assumed by Zeiss, as aforesaid, Bausch & Lomb agreed, among other things, to pay to Zeiss for a period of twenty-five (25) years from May 1, 1921, a sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of the United States, the said sum of money to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss. 241

Twelfth: Upon information and belief, that at all times subsequent to on or about December 11, 1925, and to and including on or about March 29, 1940, Carl Zeiss Inc. has refused to sell military optical instruments for use in the United States and thereby aided and abetted the furtherance of the combination and conspiracy herein alleged. 242

Thirteenth: Upon information and belief, between April 28, 1921 and March 29, 1940, the combination and conspiracy hereinbefore alleged has been operated and carried out in part within the Southern District of New York and said defendant, Bausch & Lomb and Carl Zeiss, Jena, Germany, have, by their concerted action aforesaid, sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and non-competitive prices agreed upon by the defendant, Bausch & Lomb with Carl Zeiss, Jena, Germany, and said defendant, Bausch & Lomb has received payments from the United States Government for the sale and delivery of 243

such military optical instruments which they divided between them in accordance with their said agreements.

244 Fourteenth: Upon information and belief that in pursuance of said conspiracy, combination and agreements by Bausch & Lomb and its co-conspirators, Bausch & Lomb severally at various times between May 1921 and March 1940, did submit to the Government of the United States bids for contracts for the manufacture and sale of military optical instruments and other articles and materials to be used by the United States Government in the War, Navy and other departments and bureaus of the Government. Such bids were at prices that pretended to be and were represented to be, and which the Government of the United
245 States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments. The officers authorized to accept such bids and enter into such contracts of sale and make such purchases on behalf of the Government of the United States, the Treasury, War and Navy Departments respectively, were without knowledge of the conspiracy, combination and agreements aforesaid, entered into by the defendants, and accepted various bids submit-
246 ted by the defendant Bausch & Lomb at various times, the exact dates of which are presently unknown to the plaintiffs, for manufacture and sale and the sale of military optical instruments to the Government of the United States. The said officers on behalf of the Government of the United States, its Treasury, War and Navy Departments, did make various purchases from time to time, the exact dates of which are unknown to the plaintiffs, of such

instruments, articles and materials to be supplied to the War and Navy Departments in large quantities and amounts, the exact prices, amounts and particulars of which are presently unknown to the plaintiff. 247

Fifteenth: Upon information and belief that at various times between May 1921 and March 1940, the defendants, by carrying out the combination and conspiracy hereinbefore described, have exacted arbitrary, artificial, unreasonable and non-competitive prices from the Government of the United States, in connection with the sale to it of military optical instruments. The defendants, other than Carl Zeiss Inc., severally and from time to time, the exact dates being at present unknown to the plaintiffs, have presented for payment and approval to various officers of the Civil Military and Naval service of the United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States for purchase of military optical instruments, upon the aforesaid bids, contracts and sales in large sums of money, the exact amount of which is at present unknown to the plaintiffs. The defendants, knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied. 248 249

Sixteenth: Upon information and belief the individual defendants and each of them, and Carl Zeiss Inc. participated in and aided and abetted in the matters and things herein alleged.

Seventeenth: Upon information and belief, such bids, claims, invoices, bills, statements and accounts which contained the arbitrary amounts added to the regular prices
250 that were presented by the defendants, other than Carl Zeiss Inc. and which they caused to be presented for payment and approval, and obtained payment thereof from the Government of the United States, the Treasury, Navy and War Departments, respectively for the period from November 1937 to December 1938, amounted in the aggregate, and was equal to about the sum of $8,000,000. in which said sums the defendants are indebted to the United States Government, and various other sums of money in other years, the exact amount of which is at present un-
251 known to the plaintiffs, for which said sums the defendants are indebted to the United States Government.

Eighteenth: Upon information and belief, the aforesaid agreements, acts and conduct of the defendants constituted a fraud upon the United States of America and were and are against the Public Policy, and were a violation of the Revised Statutes of the United States, §§3490-3494 (U. S. C. 231-235).

Nineteenth: Upon information and belief the aforesaid agreements by and between the defendant, Bausch & Lomb, and Carl Zeiss, Jena, Germany, and the acts and conduct
252 of Carl Zeiss, Inc. and the individual defendants, also constituted an unlawful combination and conspiracy in violation of the Statutes of the United States, and more particularly the Act of Congress of July 2, 1890 entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. Title 15, §1) and the amendments thereof.

Twentieth: Upon information and belief the defendants are not and were not at the times herein mentioned, nor any of them, in the military or naval service of the United States or in the Militia called into or actually employed in the service of the United States. 253

Twenty-one: By reason of the premises, and the acts and conduct of the defendants and the Statutes of the United States in such case made and provided, the defendants are indebted to the Government of the United States in the sum of about $20,000,000. in which amount the Government of the United States sustained damages, and the defendants shall forfeit and pay to the United States the sum of $2,000. for each of said transactions and in addition, double the amount of damages sustained by the Government of the United States, and of which amount of damages and forfeitures the plaintiffs herein are entitled to receive one-half of such forfeitures and amount of damages which they shall recover and collect, and all costs the Court may award against the said defendants. 254

WHEREFORE, plaintiffs demand judgment against the defendants for the sum of double the amount of said damages aforesaid, to wit, $40,000,000., and in addition thereto the amount of forfeitures and penalties as ascertained and determined by this Court, which shall be at least in the sum of $2,000. together with the interest on said sums and the costs of this action. 255

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address,
111 John Street,
Borough of Manhattan,
City of New York.

Indictment.

IN THE
DISTRICT COURT OF THE UNITED STATES

256 FOR THE SOUTHERN DISTRICT OF NEW YORK

C 107-169

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

INDICTMENT

The Grand Jurors of the United States of America being duly impanelled, sworn and charged in the District Court of the United States for the Southern District of New York, at the March Term of the said Court in the year 1940, and
257 inquiring for the said District, upon their oaths, find and present as follows, to wit:

COUNT ONE

DEFINITIONS

1. The term "military optical instruments" as used in this indictment shall be deemed to include such instruments as periscopes, range finders, altimeters, boresights, bomb sights, torpedo directors, sights for guns and other scientific optical instruments (except binoculars) used to direct and
258 control the firing of modern instruments and warfare. These instruments are an essential and integral part of what is commonly called the "fire control mechanism" of battleships, cruisers and submarines. They are likewise essential to the rapid and accurate firing of modern instruments and warfare.

PERIOD OF TIME COVERED BY THE INDICTMENT

2. The conspiracy and combination hereinafter alleged was entered into on or about April 28th, 1921, and continued thereafter up to and including the date of the presentation of this indictment. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or any other person, shall be deemed to be an allegation that such act was performed within the three years next preceding the date of the presentation of this indictment, unless otherwise stated. 259

THE DEFENDANTS

3. The Bausch & Lomb Optical Company is hereby indicted and made a defendant herein. The said defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb) is a corporation organized under and existing by virtue of the laws of the State of New York, and has its principal place of business in Rochester, New York. For many years, the exact number to your Grand Jurors unknown, Bausch & Lomb has maintained and now maintains an office in the Borough of Manhattan, City of New York within this Southern District of New York, and has transacted business and now transacts business within the said district. Bausch & Lomb has been for many years, and is now, engaged in the business of manufacturing, among other things, military optical instruments at its plant in Rochester, New York, and distributing and selling the said military optical instruments in interstate and foreign commerce. 260 261

4. Carl Zeiss is hereby indicted and made a defendant herein. The said defendant, Carl Zeiss (hereinafter re-

ferred to as Zeiss) is a corporation or association existing under and by virtue of the laws of Germany, and has its
262 principal place of business in Jena, Germany. For many years, the exact number to your Grand Jurors unknown, Zeiss has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world. For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of
263 Carl Zeiss, Inc., a corporation organized on or about December 11th, 1925, and existing by virtue of the laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss. Since 1921, Zeiss has carried on business in Holland and in other countries through the instrumentality and agency of N. V. Nederlandsche Instrumenten Compagnie (hereinafter referred to as Nedinsco), a corporation organized under and existing by virtue of the laws of Holland, which has its principal office at The Hague, Holland, and which is a wholly owned subsidiary of Zeiss, and is completely dominated and controlled by Zeiss. Through the instrumentality and agency of Nedinsco, Zeiss has carried
264 on the business of manufacturing military optical instruments at a plant in Holland, and distributing and selling the said instruments in various countries in the world.

5. Carl Zeiss, Inc., is hereby indicted and made a defendant herein. The said defendant, Carl Zeiss, Inc., as heretofore alleged, is a corporation organized and existing by virtue of the laws of the State of New York, and has main-

tained and now maintains its principal office in the Borough of Manhattan, City of New York, within this Southern District of New York, and has transacted business and now transacts business within the said district. 265

6. The following individuals are hereby indicted and made defendants herein, each being associated with Bausch & Lomb, and each having the official title or position therewith shown below. Said individual defendants, during a part of the period of time covered by this indictment, and during all of the three years next preceding the date of the return of the indictment, have held, and at the present time hold the official title or positions indicated below, and have been actively engaged in the management, direction, and control of the affairs and policies of Bausch & Lomb in and in connection with the interstate and foreign trade and commerce described in this indictment. 266

Name of Individual Defendants	*Address*	*Official Title or Position*
M. H. Eisenhart	Rochester, New York	President
Carl L. Bausch	Rochester, New York	Vice-President in charge of Research and Engineering
Theodore B. Drescher	Rochester, New York	Vice-President in charge of Operations

267

7. Whenever it is hereinafter alleged in this indictment that the defendant Bausch & Lomb did do or perform any act or thing, the said allegation shall be deemed to mean that

each of the said individuals named herein as defendants and described as officers, agents or employees of Bausch & Lomb did authorize, order, direct and do such act or thing. Whenever it is hereinafter alleged in this indictment that the defendant Zeiss did do, or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name, or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc.

268

NATURE OF THE INTERSTATE AND FOREIGN COMMERCE INVOLVED

8. Since 1921, Bausch & Lomb has manufactured, distributed and sold a substantial part of all optical instruments manufactured and distributed in the United States. In the five years next preceding the date of the return of this indictment, Bausch & Lomb has manufactured, distributed and sold approximately 50% of all military optical instruments manufactured, distributed and sold within the United States.

269

9. For many years, including the three years next preceding the date of the return of this indictment, Zeiss and its subsidiary Nedinsco have been among the largest manufacturers and sellers of various types of optical instruments, including military optical instruments, in the world. For many years, including the three years next preceding the date of the return of this indictment, Zeiss and Nedinsco have manufactured and sold the greater part of all military optical instruments manufactured and sold in Europe.

270

10. For many years prior to 1921, Bausch & Lomb and Zeiss competed with each other in countries other than the United States in the sale of all types of optical instruments,

including military optical instruments. Since 1921, Bausch & Lomb and Zeiss have not competed either in the United States or any other countries in the world in the sale and distribution of military optical instruments, although they have continued to compete in the sale and distribution of certain other types of optical instruments. Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world. 271

11. Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government and has, upon occasion, as hereinafter alleged, also sold military optical instruments to foreign governments, and to firms, shipyards and individuals located in the states of the United States other than the State of New York. The United States Government purchases such instruments for use on battleships, cruisers and submarines and for use with aircraft and artillery. Upon the receipt of an order from the United States Government, the said instruments are manufactured in Rochester, New York, and are shipped and transported in interstate commerce to the United States shipyards, forts and various military and naval units located in San Francisco, California; Boston, Massachusetts; Brooklyn, New York; Philadelphia, Pennsylvania; Washington, District of Columbia, and to various other states of the United States of America. 272 273

12. On a number of occasions between 1921 and the date of the return of this indictment, military optical instruments have been sold by Bausch & Lomb directly to Govern-

ments other than that of the United States of America. Bausch & Lomb manufactured the said instruments in
274 Rochester, New York, and shipped such instruments to the foreign country through the Port of New York, and such shipments constituted shipments in interstate and foreign commerce.

13. On a number of occasions between 1921 and the date of the return of this indictment, military optical instruments have been purchased from Bausch & Lomb by various firms, shipyards and individuals located in the United States of America. The instruments were used in the construction of battleships, cruisers and submarines intended for delivery to a foreign country. Bausch & Lomb manu-
275 factured the said instruments in Rochester, New York, and shipped such instruments to the various firms, shipyards, and individuals located in the United States of America, and such shipments constituted shipments in interstate commerce. Such instruments were intended for ultimate use in foreign commerce and were transported in foreign commerce.

14. At all times since 1921, including the three years next preceding the date of the return of this indictment, Bausch & Lomb and Zeiss have been engaged in importing military optical instruments into the United States through the Port
276 of New York in the said Southern District of New York. Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb through the Port of New York in the said Southern District of New York. Except for the said military optical instruments so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instru-

ments which have been manufactured outside the United States.

THE COMBINATION AND CONSPIRACY 277

15. Beginning on or about April 28, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendant Bausch & Lomb, defendants Eisenhart, Bausch and Drescher, and since on or about December 11th, 1925, the date of its incorporation, defendants Zeiss Inc., and continuing at all times thereafter up to and including the date of the presentation of this indictment, such defendants and other persons to your Grand Jurors unknown, well knowing all of the foregoing facts, have been engaged in a wrongful and unlawful combination 278 and conspiracy, carried on in part within the Southern District of New York, in restraint of the aforesaid interstate and foreign commerce in military optical instruments in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", that is to say:

16. The defendants, Bausch & Lomb and Zeiss, from on or about April 28th, 1921, to the date of the presentation of this indictment, and the defendants, Eisenhart, Bausch and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb, to the date of the 279 presentation of this indictment, and the defendant, Carl Zeiss Inc., from the date of its incorporation on or about December 11th, 1925 to the date of the presentation of this indictment, and other persons to the Grand Jurors unknown, have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and

conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for mili-
280 tary optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of such military optical instruments; (d) that Zeiss would not permit any person, firm or corporation which was engaged, or which wished to
281 engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment, and (e) that Bausch & Lomb would not permit any person, firm or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military optical
282 instruments, to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, instruments, machinery, and equipment.

17. Said unlawful combination and conspiracy has been effectuated by divers means and methods, including among others, the following:

283

(a) On or about April 28th, 1921, the corporate defendants entered into a written agreement in German for a period of twenty-one years, from May 1st, 1921, to April 30th, 1941. Paragraph 3 of such agreement as translated by defendant Bausch & Lomb, provides as follows:

> "B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution."

284

In Paragraph 9 of the said contract, Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons, and (so far as practicable) not to disclose the contract even to their own employees.

(b) In consideration of the obligations assumed by Zeiss in Paragraph 3 of the said agreement of April 28th, 1921, and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in Paragraph 2 of the said agreement of April 28th, 1921, to pay to Zeiss for a period of twenty-five years from May 1st, 1921, a royalty equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be

285

paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by
286 patents owned by Zeiss.

(c) The April 28th, 1921 agreement alleged in Paragraph 17(a) of this indictment, was supplemented on June 27th, 1925, and again on October 28th, 1925, to modify the provisions of Paragraph 2 with respect to royalty payments and to modify Paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the
287 price quoted should be agreed upon by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a mark-up over the bidders regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

(d) A new agreement, signed by Bausch & Lomb at
288 Rochester, New York, on November 26, 1926, and by Zeiss at Jena, Germany, on December 24th, 1926, was entered into by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28th, 1921 as supplemented, except that Paragraph 9 calling for secrecy was omitted from the new written agreement, Paragraph 2 was modified as to the royalty payments, and Paragraph 3

was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that Paragraph 3 of the contract of April 28th, 1921 as supplemented, violated the Anti Trust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the April 28th, 1921 agreement as supplemented in 1925. 289 290

(e) At all times after May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, until Zeiss has consented to such a sale. On a number of occasions since June 27th, 1925 Bausch & Lomb has sold military optical instruments for use outside of the United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale the sale was made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May, 1921, Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent of Zeiss, at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May, 1921, to and including the three years next preceding the date of the return 291

of this indictment, Bausch & Lomb has refused to permit persons, firms and corporations who were engaged or who
292 wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to sell military optical instruments for use within the United States unless the sales were consented to by Bausch & Lomb. On various
293 occasions, subsequent to June 27th, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the pro-
294 duction of military optical instruments even though such persons, firms and corporations were ready, willing and able to compensate Zeiss for such use.

(g) Since May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to

Zeiss (pursuant to the provisions of Paragraph 2 of the said agreement of April 28th, 1921, as supplemented and modified, as described in Paragraph 17(c) and (d) of this indictment), as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of miliary optical equipment with respect to which the payment was made, has been covered in whole or in part by patents owned by Zeiss. 295

(h) At all times subsequent to on or about December 11th, 1925, to and including the three years next preceding the date of the return of this indictment, Carl Zeiss, Inc. has refused to sell military optical instruments for use in the United States. 296

EFFECTS OF THE COMBINATION AND CONSPIRACY

18. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially and unreasonably restrained interstate and foreign commerce in military optical instruments; have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States, and have prevented and restrained free and vigorous competition in the production and distribution of military optical instruments in the United States and in the interstate and foreign commerce. 297

JURISDICTION AND VENUE

19. The combination and conspiracy hereinbefore alleged, has operated and has been carried out, in part, within the

Southern District of New York. The defendants, within three years preceding the date of the return of this indictment, in effectuating and carrying on said combination and conspiracy, have, within said district, performed, among others, the following acts:

298

(a) Bausch & Lomb refused in said district to sell military optical instruments to prospective purchasers if such instruments were eventually to go outside of the United States of America.

(b) Bausch & Lomb refused in the said district to enter into arrangements whereby the information, knowledge, equipment and machinery of Bausch & Lomb would be sold or employed in the production of military optical instruments intended for use outside the United States.

299

(c) Zeiss has shipped and Bausch & Lomb has received military optical instruments, through the Port of New York, in the Southern District of New York, which instruments were thereafter sold by Bausch & Lomb to the Government of the United States at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by the defendants.

(d) Zeiss has collected and received from Bausch & Lomb in the said Southern District of New York, the said royalty payments paid by Bausch & Lomb to Zeiss pursuant to the said contract of April 28th, 1921 as supplemented and modified by the agreements referred to in Paragraph 17(c) and (d) in this indictment.

300

(e) Carl Zeiss, Inc. has refused in the said Southern District of New York to sell military optical instruments to prospective purchasers for use within the United States.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants, including the corporate defendants, throughout the period aforesaid, including the three years next preceding the date of the return of this indictment, at the places and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in military optical instruments among the several states of the United States of America, and with foreign nations, contrary to the form of the statute of the United States of America in such case made and provided and against the peace and dignity of the United States of America. 301

COUNT TWO 302

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate as if herein set forth in full, each of the allegations set forth in Paragraphs 1 to 4, inclusive, and 6 to 14, inclusive, of Count One of this indictment.

THE COMBINATION AND CONSPIRACY

20. Beginning on or about April 28th, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendants, Bausch & Lomb, defendants Eisenhart, Bausch and Drescher, and continuously thereafter up to and including the date of the presentation of this indictment, such defendants, well knowing all the facts heretofore alleged in this indictment, have been engaged in an unlawful combination, conspiracy and contract carried on in part within the Southern District of New York in restraint of interstate and foreign commerce in military 303

optical instruments. In so doing the defendants have then and there engaged in an unlawful combination, conspiracy,
304 and agreement intended to operate in restraint of lawful trade and free competition in the United States in imported military optical instruments and intended to increase the market price in the United States of America of said imported military optical instruments, all in violation of §73 of the Act of August 27, 1894, entitled "An Act to amend Section seventy-three and Section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' ", that is to say

305 21. The defendants, Bausch & Lomb and Zeiss, from on or about April 28th, 1921, to the date of the presentation of this indictment, and the defendants Eisenhart, Bausch and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb to the date of the presentation of this indictment, and other persons to the Grand Jurors unknown, have been continuously engaged during and throughout the periods of time aforesaid, in an unlawful combination and conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to the United States of America, and the exclusive territory
306 of Zeiss to be the rest of the world; and (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices, and terms of sale on such military optical instruments; (d) and that

defendant Zeiss would not sell any military optical instruments or any parts thereof, or any machinery capable of being used for the manufacture of military optical instruments to any person, firm or corporation in the United States which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments. 307

22. Said unlawful combination and conspiracy has been effectuated by divers means and methods including, among others the following:

(a) On or about April 28th, 1921, Bausch & Lomb and Zeiss entered into a written agreement in German for a period of twenty-one years, from May 1st, 1921 to April 30th, 1941. Paragraph 3 of such agreement as translated by defendant Bausch & Lomb, provides as follows: 308

> "B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution."

309

In Paragraph 9 of the said contract Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons and (so far as practicable) not to disclose the contract even to their own employees.

(b) In consideration of the obligations assumed by Zeiss in Paragraph 3 of the said agreement of April 28th, 1921

and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in Paragraph 2 of the said
310 agreement of April 28th, 1921, to pay to Zeiss for a period of twenty-five years a royalty equal to a percentage of the gross sales price of each military optical instruments sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

(c) The April 28th, 1921 agreement alleged in Paragraph 22(a) of this indictment was supplemented on June 27th,
311 1925 and again on October 28th, 1925, to modify the provisions of Paragraph 2 with respect to royalty payments and to modify Paragraph 3 so as to specify the circumstances under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed upon by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a markup over the bidders
312 regular price up to 20% of said regular price, which excess was intended to throw the business to the party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party.

(d) A new agreement, signed by Bausch & Lomb at Rochester, New York, on November 26th, 1926, and by Zeiss

at Jena, Germany, on December 24th, 1926 was entered into by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28th, 1921, as supplemented, except that Paragraph 9 calling for secrecy was omitted from the new written agreement, Paragraph 2 was modified as to royalty payments and Paragraph 3 was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that Paragraph 3 of the contract of April 28th, 1921, as supplemented, violated the Anti-Trust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28th, 1921 agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the original April 28th, 1921 agreement as supplemented in 1925. 313 314

(e) At all times after May 1st, 1921 to and including the three years next preceding the date of the return of this indictment Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, unless Zeiss has consented to such a sale. On a number of occasions since June 27th, 1925, Bausch & Lomb has sold military optical instruments for use outside of the United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale the sale was made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May, 1921, 315

Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent
316 of Zeiss, at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May, 1921, and including the three years next preceding the date of the return of this indictment, Bausch & Lomb has refused to permit persons, firms and corporations who were engaged or who wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing
317 and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1st, 1921, to and including the three years next preceding the date of the return of this indictment, Zeiss has refused to sell military optical instruments for use within the United States unless the sales were consented to by Bausch & Lomb. On various occasions subsequent to June 27th, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1st, 1921, including the three years next preceding
318 the date of the return of this indictment, Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the production of military optical instruments even though

such persons, firms and corporations were ready, willing and able to compensate Zeiss for such use.

(g) Since May 1st, 1921, and including the three years next preceding the date of the return of this indictment, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to Zeiss (pursuant to the provisions of Paragraph 2 of the said agreement of April 28th, 1921, as supplemented and modified, as described in Paragraph 22(c) and (d) of this indictment) as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb, including each piece of such equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of military optical equipment with respect to which the payment was made, has been covered in whole or in part by patents originating with Zeiss. 319 320

EFFECTS OF THE COMBINATION AND CONSPIRACY

23. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially and unreasonably restrained lawful trade and free competition in imported military optical instrument; have exacted arbitrary, artificial, unreasonable, excessive and noncompetitive prices from purchasers of imported military optical instruments, including the Government of the United States, and have prevented and restrained free and vigorous competition in the production and distribution of imported military optical instruments in the United States and in interstate and foreign commerce. 321

JURISDICTION AND VENUE

24. The combination and conspiracy hereinbefore alleged,
322 has operated and has been carried out, in part, within the Southern District of New York. The defendants, within three years preceding the date of the return of this indictment, in effectuating and carrying on said combination and conspiracy, have, within said district, performed, among others, the following acts:

(a) Zeiss has shipped from Europe and Bausch & Lomb has received military optical instruments, through the Port of New York, in the Southern District of New York, which imported instruments were thereafter sold by Bausch &
323 Lomb to the Government of the United States at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by the defendants.

(b) Zeiss has collected and received from Bausch & Lomb in the said Southern District of New York, the said royalty payments paid by Bausch & Lomb to Zeiss pursuant to the said contract of April 28th, 1921 as supplemented and modified by the agreements referred to in Paragraph 22(c) and (d) in this indictment.

And so the Grand Jurors aforesaid, upon their oaths
324 aforesaid, do find and present that the defendants, including the corporate defendants, throughout the period aforesaid, including the three years next preceding the date of the return of this indictment, at the places and in the manner and form aforesaid, unlawfully have engaged in a continuing combination and conspiracy intended to operate in restraint of lawful trade and free competition in imported military optical instruments among the several states of

the United States of America, and with foreign nations, and intended to increase the price of imported military optical instruments, contrary to the form of the statute of the United States of America, in such case made and provided, and against the peace and dignity of the United States of America.

Samuel S. Isseks (Sgd)
SAMUEL S. ISSEKS,
Special Assistant to the
Attorney General.

Monroe Karasik (Sgd)
MONROE KARASIK

Marcus A. Hollabaugh (Sgd)
MARCUS A. HOLLABAUGH

Stanley E. Disney (Sgd)
STANLEY E. DISNEY

Irving B. Glickfeld (Sgd)
IRVING B. GLICKFELD
Special Attorneys.

Attorneys for the United States of America

A true bill

GEORGE E. SEALY
Foreman

May 27, 1940

The Bausch & Lomb Optical Co. pleading

328 Nollo Contendre

by M. H. Eisenhart

M. H. Eisenhart ..... Nollo contendre plea entered

Carl L. Bausch ..... " "

Theodore B. Drescher ..... " "

Carl Zeiss Inc. adjd. to 6/24

Each of Defts. The Bausch & Lomb Optical Co.
M. H. Eisenhart, Carl L. Bausch and
329 Theodore B. Drescher

Fined $5,000. on each of counts 1 & 2

GODDARD, *J.*

Bail discharged as to M. H. Eisenhart,
Carl L. Bausch & Theodore B. Drescher
on consent of Spec. Asst. to Atty. General

GODDARD, *J.*

Mar 5—1941

Carl Zeiss Inc.—Pleads nollo contendre
by A. L. Love Jr., V. P. & Sec.

330

Fined $1,000.

G., *J.*

March 29, 1940

The Bausch & Lomb Optical Co.
Pleads not guilty

by Whitney W. Seymour,
Atty of firm of Simpson, Thacher & Bartlett

Indictment.

Carl Zeiss, Inc. Pleads not guilty
by C. L. Hays, Atty

M. H. Eisenhart Pleads not guilty 331
Bail $1000.) Paroled
Carl L. Bausch " ") to give bail
Pleads not guilty

Deft. Eisenhart and Bausch
allowed to depart the jurisdiction
of this Court — —

Order to be entered.

Twenty days for motions.

332

MANDELBAUM, *J.* J. G.

Apr. 16, 1940

Theodore B. Drescher Pleads not guilty
Bail $1000

Paroled to give bail

CONGER, *J.*
J. G.

333

BAUSCH & LOMB BILL OF PARTICULARS.

IN THE
DISTRICT COURT OF THE UNITED STATES
334
FOR THE SOUTHERN DISTRICT OF NEW YORK

C 107–169

UNITED STATES OF AMERICA,

Plaintiff,

—*v.*—

BAUSCH & LOMB OPTICAL COMPANY, *et al.*,

Defendants.

335

The United States of America, by Samuel S. Isseks, Special Assistant to the Attorney General of the United States, its attorney, voluntarily submits the following bill of particulars, on information and belief in answer to the demands of the defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch, and Theodore B. Drescher, embodied in the motion dated April 16, 1940, for a bill of particulars served upon the Government on the 17th day of April, 1940.

The numbering herein follows the numbering in the defendants' motion papers.
336

1. & 2. The conspiracy and combination entered into on or about April 28, 1921, as alleged in paragraphs 2, 15, 16, 20 and 21 of the indictment, was on or about that date entered into by defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb), its then vice president, George N. Saegmuller (now deceased), and Carl

Zeiss of Jena, Germany (hereinafter referred to as Zeiss) and its officers, Dr. Ing. Bauersfeld, and another named "Kotthaus".

337 The conspiracy and combination was in writing, and photostatic copies of a written agreement in German between Bausch & Lomb and Zeiss and an English translation of such agreement made for and by the defendant, Bausch & Lomb, both produced by the defendant Bausch & Lomb before the Grand Jury in compliance with a subpoena duces tecum served upon it, are annexed hereto and marked, respectively, Exhibits A and B.

In addition to the express terms of the agreement as set forth in Exhibits A and B to this bill of particulars, it was agreed between defendants Bausch & Lomb and Zeiss, and 338 the other individuals referred to who entered into the combination and conspiracy, that in the case of sales made by Bausch & Lomb or Zeiss for use in the territory exclusively assigned to the other, Bausch & Lomb and Zeiss would together fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of military optical instruments; that Zeiss would not permit any person, firm or corporation which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss on any terms in 339 connection with such manufacture and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery and equipment; and similarly that Bausch & Lomb would not permit any person, firm or corporation which was engaged or which wished to engage outside the United States in the

business of manufacturing and distributing military optical instruments to use any of the devices, information, instru-
340 ments, machinery or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution, even though such persons, firms or corporations were ready, willing and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, machinery and equipment.

The details and circumstances with regard to the entering of this conspiracy and combination are as follows:

Prior to April 28, 1921, a representative of Zeiss conferred in Rochester with officers, directors, and employees of Bausch
341 & Lomb, including Edward Bausch, then president of Bausch & Lomb and now chairman of its Board of Directors, Carl F. Lomb (now deceased), William A. E. Drescher (now deceased), and George N. Saegmuller (now deceased). As a result of negotiations in Rochester, said George N. Saegmuller, vice president, was designated and given full power of attorney by the directors of Bausch & Lomb to go to Germany, and negotiate an agreement with Zeiss relating to military optical instruments and the division of territory in respect thereof. Said George N. Saegmuller, with his son, Frederick B. Saegmuller, then an employee of Bausch & Lomb, went to Germany, and there negotiated the terms of
342 the agreement hereinabove referred to in this bill of particulars. Said agreement provided that a separate Military Department of Bausch & Lomb would be created under the guidance of Zeiss. Said Oswald H. Wolferts then left the employ of Zeiss (with the consent of Zeiss) to become employed in the newly created Military Department of Bausch & Lomb. On October 3, 1921 a committee consisting of Edward Bausch, defendant M. Herbert Eisenhart, said Fred-

erick B. Saegmuller, and Dr. O. Eppenstein, representing Zeiss, executed a memorandum in Rochester for the creation by Bausch & Lomb of a new Military Department with said Frederick B. Saegmuller at its head and said Oswald H. Wolferts as his assistant. By the terms of this memorandum, the Military Department was to report to the Executive Committee of Bausch & Lomb through Defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Joseph F. Taylor of Bausch & Lomb. 343

3. Military optical instruments sold by Bausch & Lomb to foreign governments and to firms, ship yards, and individuals located in States of the United States other than the State of New York, as alleged in paragraph 11 of the indictment, were sold to the following: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of defendant Bausch & Lomb, and the Government reserves the right to prove such other instances from such other records). 344

345

Bausch & Lomb Bill of Particulars.

348

346

347

(a) *When and Where Sold*	(c) *Name of Vendee and Price*	(b) *Description of Inst.*
(i) On or about 9/8/27	Bloomfield, New Jersey	1 m. Range Finder $750.	Geo-Physical Laboratory
(ii) On or about 3/7/27	Chicago, Illinois	1 m. Range Finder $640.	Almer Coe & Co.
(iii) On or about 8/15/24	Fore River, Mass.	4 Mark xi telescopes $242. each	Bethlehem Ship Building Corp.
(iv) On or about 8/15/24	Fore River, Mass.	4 Mark xi telescopes with checking eye-piece $352. each	Bethlehem Ship Building Corp.
(v) On or about 8/15/24	Fore River, Mass.	Mark vi telescopes $533. each	Bethlehem Ship Building Corp.
(vi) On or about 8/15/24	Fore River, Mass.	4 24 ft. erect Coincidence Range Finders each $99.	Bethlehem Ship Building Corp.
(vii) On or about 8/15/24	Fore River, Mass.	1 Mark xi telescope, Model 6 $242.	Bethlehem Ship Building Corp.
(viii) On or about 8/15/24	Fore River, Mass.	1 Mark xi telescope, Model 5 $352.	Bethlehem Ship Building Corp.
(ix) On or about 8/15/24	Fore River, Mass.	1 Mark iii telescope $540.	Bethlehem Ship Building Corp.
(x) On or about	Fore River,	4 Mark xi Model- $242.	Bethlehem Ship

(a) W

(i) O
4/

(ii) On
10

ch
ar
as
fo
th
sta
be
an
ins

shi
for
for

COPY PRINTED CLOSE TO EDGE

Bausch & Lomb Bill of Particulars.

4. Military optical instruments sold by Bausch & Lomb direct to Governments other than that of the United States, as alleged in paragraph 12 of the indictment, are as follows: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of Bausch & Lomb and the Government reserves the right to prove such other instances from such other records.)

(a) *When and Where Sold*		(b) *Description of Inst. and Price*		(c) *Name of Vendee*
(i) On or about 4/5/28	Rochester, New York	10–15 bore sights	$205. each	Brazilian Government
(ii) On or about 10/22/29	Washington, D. C.	12" gun sight telescopes	$385. each	Brazilian Government

5. (a), (b), and (d). Military optical instruments purchased from Baush & Lomb by various firms, ship yards and individuals located in the United States of America, as alleged in paragraph 13 of the indictment are those set forth under items (iii) to (x) in paragraph 3 hereof, except that as stated in paragraph 3 hereof, there may be other instances not shown by records produced by Bausch & Lomb before the grand jury pursuant to a subpoena duces tecum, and the Government reserves the right to prove such other instances from other records of Bausch & Lomb.

(c) The instruments used in the construction of battle ships, cruisers and submarines intended for delivery to a foreign country, as alleged in paragraph 13 of the indictment, formed parts of fire control apparatus of the battle ships

"Rivadavia" and "Moreno", and were intended for delivery to the Republic of Argentina.

352 6. Military optical instruments imported into the United States through the Port of New York by Bausch & Lomb and Zeiss, presently known to the Government are set forth below. These instances have been disclosed by the records of Bausch & Lomb produced before the grand jury pursuant to a subpoena duces tecum. Many other instances may be shown by other records of Bausch & Lomb presently in its possession, and the Government reserves the right to prove such other instances from such records:

353

354

(a) *When Military Optical Instruments were imported into the United States*	(b) *What Instruments were so Imported and the Prices thereof.*	(c) *Points to and from which such Shipments were Allegedly made.*
(i) On or about 6/1/30	1 stereo 4 m. Range Finder type disaltimus i, $7,360.	From Venlo/Rotterdam, Holland to New York City.
(ii) On or about 6/1/30	1 stereo 4 m. Range Finder, $6,030.	From Venlo/Rotterdam, Holland to New York City.
(iii) On or about 12/15/30	Machine frames, total price approximately $3,465.65.	From Bremen, Germany to New York City
(iv) On or about 8/15/30	6 combine stedimeter and course detector attachments, price unknown.	From Venlo/Rotterdam, Holland to New York City.
(v) On or about 11/7/33	Altimeter periscopes and accessories, approximately $20,634.80	From Venlo/Rotterdam, Holland to Navy Yard, Brooklyn, New York.
(vi) On or about 9/26/33	2 altimeter periscopes and accessories, total price of approximately $15,280.50	From Venlo/Rotterdam, Holland to Navy Yard, Brooklyn, New York.
(vii) On or about 9/15/38	1 8-meter stereo-telemeter, price to United States Government, approximately $24,460	From Venlo/Rotterdam, Holland, to New York.

120

7, 10. The dates since when it is claimed that the defendants Eisenhart, Bausch and Drescher have been engaged in
358 the combination and conspiracy as alleged in paragraphs 15 and 16, and 20 and 21, of the indictment are as follows:

Defendant Eisenhart has been engaged in the combination and conspiracy since no later than October 3, 1921, when he executed the memorandum referred to in paragraphs 1 and 2 of this bill of particulars.

Defendant Carl L. Bausch has been engaged in the combination and conspiracy since no later than October 1927, when he succeeded said Frederick B. Saegmuller as the person in charge of Bausch & Lomb's Military Department.

359 Defendant Drescher has been engaged in the combination and conspiracy since some time in 1922, when he became a director of Bausch & Lomb.

8, 9. The defendants Eisenhart, Bausch and Drescher entered into the agreement referred to in paragraphs 16 and 21 of the indictment as follows:

Defendant Eisenhart, in Rochester, not later than October 3, 1921, when he executed the memorandum referred to in paragraphs 1 and 2 of this bill of particulars.

Defendant Bausch, in Rochester, not later than October 1927, when said Bausch became the head of the
360 Military Department of Bausch & Lomb.

Defendant Drescher, in Rochester, when he became a director of Bausch & Lomb, in 1922.

Defendants Eisenhart, Bausch and Drescher each joined the conspiracy theretofore entered into on or about April 28, 1921 by Bausch & Lomb and Zeiss and the individuals referred to in paragraphs 1 and 2 of this bill of particulars, and the nature and substance of the agreement which they entered into are set forth in paragraphs 1 and 2 of this bill of particulars.

11. (a) A photostatic copy of the German agreement

alleged in paragraph 17 (a) and (b) and paragraph 22 (a) and (b) of the indictment, and a photostatic copy of a translation of such agreement as made for and by Bausch & Lomb 361
are attached hereto and marked Exhibits A and B, respectively.

(b) Such agreement was entered into on or about April 28, 1921 in Jena, Germany, and George N. Saegmuller (now deceased) acted on behalf of Bausch & Lomb.

12. (a) Copies of the agreements alleged in paragraph 17 (c) and paragraph 22 (c) of the indictment, as translated in English by and for Bausch & Lomb, are annexed hereto and marked Exhibits C and D, respectively.

(b) The agreement of June 27, 1925 as alleged in para- 362
graphs 17 (c) and 22 (c) of the indictment was executed on behalf of Bausch & Lomb at Rochester by Carl F. Lomb (now deceased).

The agreement of October 28, 1925, as alleged in paragraphs 17 (c) and 22 (c), was executed by Bausch & Lomb in Rochester on December 11, 1925 by said Carl F. Lomb.

13. (a) A photostatic copy of the German agreement alleged in paragraphs 17 (d) and 22 (d), and a translation of such agreement made for and by Bausch & Lomb are annexed hereto and marked Exhibits E and F, respectively.

(b) Such agreement was executed on behalf of Bausch 363
& Lomb by Carl F. Lomb (now deceased).

14. Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales, as alleged in paragraphs 17 (e) and 22 (e) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
i	On or about February 26, 1940	New York City	Height Finders	American Ordnance Corp.
				Hoepli & Co.
ii	On or about December 12, 1939	New York City	2 and 4 meter Range Finders	
iii	On or about November 6, 1939	New York City	3 Range Finders	Aviation Equipment & Export Co.
iv	On or about August 23, 1939	Washington,	1) 10 Anti-Aircraft Height and Range Finders, 4 meter base 2) 22 Marine Range Finders, 4 meter base	Ministry of Defense, Finland

364 365 366

v	On or about January 6, 1939	New York City	1) 8 Goniometers graduated in mills 2) 2 Squares 3) 2 Telescopes for battery commanders 4) 4 Prismatic compasses 5) 2 Field glasses 6) 2 Telemeters, one meter base 7) 2 Telescopic, indexed quadrants 8) 2 Circumferentors with tripods 9) 2 Modern Telephone Communicating Systems	Frank Sheridan Jonas
vi	On or about October 13, 1938	Irvine, Pa.	Range Finders	National Forge & Ordnance Co.

369 368 367

	(a) *When*	*Where*	(b) *Instruments*	(c) *Name of Prospective Buyer*
vii	On or about May 13, 1938	Irvine, Pa.	18 Panoramic telescopes	National Forge & Ordnance Co.
viii	On or about April 1, 1938	Rahway, N. J.	4 meter and 6 meter Range Finders	American Armament Corp.
ix	On or about March 30, 1938	Washington, D. C.	4 meter Stereo Height Finders	British Embassy
x	On or about September 13, 1937	Cleveland, Ohio	1 meter Range Finder	Eastman Kodak Stores, Inc.
xi	On or about June 8, 1937	East Hartford, Conn.	Airplane Machine Gun Sighting Devices	United Aircraft Exports Corp.
xii	On or	Hoboken, N. J.	1) 6/8 meter Army	American Armament Corp.

124

xii	On or about August 17, 1936	Hoboken, N. J.	1) 6/8 meter Army Range Finders 2) 12/14 meter Navy Range Finders	American Armament Corp.
xiii	On or about August 7, 1936	New York City	Stereo Range and Height Finders	Carp Export & Import Corp.
xiv	On or about June 19, 1936	New York City	Stereo Range Finders	Morris Wolf
xv	On or about February 6, 1936	Irvine, Pa.	Anti-Aircraft Telescopes	National Forge & Ordnance Co.
xvi	On or about February 6, 1936	Rio de Janeiro, Brazil	Telemeters	Military Aviation School
xvii	On or about June 12, 1934	New York City	Range Finders	Kenneth M. Hill

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xviii	On or about May 25, 1934	New York City	4 Telemeters	Ernest A. Abadie
xix	On or about April 4, 1934	New York City	Military Fire Control Instruments	Lucke Kiffe Company
xx	On or about April 3, 1934	Athens, Greece	Height Finder Stereo Spotting Telescopes	Spiridon Tzimopoulos
xxi	On or about April 2, 1934	Paris, France	8 meter Periscope	Mathis & Cie.
xxii	On or about December 1, 1933	Bangkok, Siam	Height Finders and Range Finders	Suphan Phanich Co., Ltd.
xxiii	On or	Shanghai,	1) Fire Control	George Hung & Company

127

xxiii	On or about April 13, 1933	Shanghai, China	1) Fire Control Equipment for 37 milimeter Anti-Aircraft Gun 2) Fire Control Equipment for 3 inch Anti-Aircraft Gun	George Hung & Company
xxiv	On or about October 31, 1932	Mexico City, Mexico	1 meter Naval Coincidence Range Finder	Mario Padilla
xxv	On or about October 26, 1932	Schenectady, New York	1 meter Naval Coincidence Range Finders and Mounts	International General Electric Co., Inc.
xxvi	On or about April 21, 1932	Stockholm, Sweden	1) Telemeters 2) Military and Naval Range Finders	Aktiebolaget Ernst Aug.Jürke
xxvii	On or about March 8, 1932	Washington, D. C.	1) Height Finders 2) Range Finders 3) Observer Telescopes	Spanish Embassy

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xxviii	On or about January 21, 1932	Pittsburgh, Pa.	Artillery Spotter	Federal Laboratories, Inc.
xxix	On or about October 30, 1931	Hamburg, Germany	Bomb Sights	Simon, Evers & Co. G.m.b.H.
xxx	On or about July 13, 1931	Washington, D. C.	8 Height Finders	Department of Commerce for Greek Government
xxxi	On or about December 27, 1930	New York City	3 meter Stereo Range and Height Finders	Interflash Signal Corp.
xxxii	On or about July 17, 1930	Canton, Ohio	Range Finder	The Berger Manufacturing Company

xxxiii	On or about April 22, 1930	New York City	Two hundred 1-1/4 meter Invert Range Finders	Amtorg Trading Corporation
xxxiv	On or about July 25, 1929	Marcinelle, Belgium	20/25 cm. Range Finder	Leopold Gabriel
xxxv	On or about April 24, 1929	New York City	Range Finders for Optical Fire Control Instruments	Lieutenant T. W. Biggs, Chilean Naval Attache
xxxvi	On or about August 29, 1928	Athens, Greece	3 Telemeters, 12/15 feet	Grote & Company
xxxvii	On or about November 27, 1927	Buenos Aires, Argentina	Director Telescopes	Ministry of Marine

130

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xxxviii	On or about September 20, 1927	New York City	One 1-1/2 meter Range Finder	Asano Bussam Co. Ltd.
xxxix	On or about March 19, 1927	New York City	1) One Range Finder 2) One Direction Finder	Suzuki & Co. Ltd.
xl	On or about January 14, 1927	New London, Conn.	Submarine Periscopes	Electric Boat Company
xli	On or about December 23, 1926	New York City	Sighting Periscopes	Newport News Shipbuilding & Drydock Co.
xlii	On or about September 14, 1926	Atlantic City, N. J.	1 meter Range Finder Taximeters	Brazilian Naval Attache

xliii	On or about May 18, 1926	Helsinki, Finland	1) 5, 6 meter Range Finders 2) 11, 4 meter Range Finders	Finnish Government
xliv	On or about November 25, 1925	Moukden, China	50, Stereo Range Finders	K. A. Swamberg
xlv	On or about April 9, 1925	Warsaw, Poland	Shear Telescopes	Trojanowski & Lozinski Bros., Ltd.
xlvi	On or about March 24, 1925	Spezia, Italy	Range Finders Periscopes	F. Todeschini
xlvii	On or about June 30, 1924	London, England	40, 80 centimeter Infantry Range Finders	Persons unknown who communicated with Bausch & Lomb Optical Co., Ltd., London, England

131

132

	(a)		(b)	(c)
	When	*Where*	*Instruments*	*Name of Prospective Buyer*
xlviii	On or about December 12, 1923	Santa Barbara, Honduras	Range Finders	Paul C. Heller
xlix	On or about October 10, 1923	Ottawa, Canada	Floating Range Finder	Instruments, Ltd.
l	On or about October 4, 1923	New York City	Instruments used in aerial navigation	National Association of Manufacturers for Etablissements Aera
li	On or about August 2, 1923	Washington, D. C.	Submarine Periscopes	Brazilian Navy
lii	On or about July 9, 1923	Argentina	Stereoscopic Range Finders	Republic of Argentina

On or about December 15, 1922	Helsingfors, Finland	80 centimeter Range Finder	Captain D. Daragan
On or about March 3, 1922	Washington, D. C.	1) Range Finders 2) Fire Control Instruments 3) Anti-Aircraft Telescopes	Ministry of Czechoslovakia

15, 16. Bausch & Lomb since subsequent to May, 1921, has either sold or offered to sell military optical instruments for use outside of the United States, only after having first obtained the consent of Zeiss, as alleged in paragraphs 17 (e) and 22 (e) of the indictment in the following instances: (The Government does not know whether in fact the offer of sale was consummated in each instance, but this is unquestionably known to the defendants. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury, pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances based on other records of Bausch & Lomb.)

	When	*Where*	*Instruments*	*Vendee*	*Price*	*Zeiss Consent When Where Obtained*	*Price Agreement When Where Made*
(i)	On or about April 30, 1936	Rochester, New York	One to six 4-meter altitude meters	Argentine Naval Commission	$22,000 to $26,000	See Exhibits G. & H. attached	
(ii)	On or about February 12, 1936	New York City	2–½ meter coincidence range finders	United Dry Docks, Inc.	$5,600 to $ 6,200 each	Facts in Defendants' possession and presently unknown to Government	
(iii)	On or about August 21, 1934	New York City	Stereo Range Finders	Amtorg Trading Corp.	$24,000 to $25,000 each	See Exhibits G. & H. attached	
(iv)	On or about November 29, 1933	Groton, Conn.	2 15 ft. stereo range finders	Electric Boat Co.	$9,500	See Exhibits I. & J. attached	

(v)	On or about November 23, 1933	Rochester, New York	1 4-meter altitude meter	Government of Siam	$24,000	See Exhibits K. & L. attached
(vi)	On or about March 28, 1928	Rochester, New York	10 to 15 boresights	Brazilian Government	$180/205	See Exhibits M. & N. attached
(vii)	On or about January 18, 1926	Hartford, Conn.	50/100 80 centimeter coincidence range finders	Colts Patent Fire-arms Mfg. Co.	$700 each	Facts in defendants' possession and presently unknown to Government
			50/100 Battery Commander Telescopes		$490 each	
(viii)	On or about December 31, 1925	Unknown	Submarine Gun Sight telescopes	Unknown	$375 each	See Exhibits O. & P. attached

	408 When	408 Where	407 Instruments	407 Vendee	407 Price	406 Zeiss Consent When Obtained	406 Zeiss Consent Where Obtained	406 Price Agreement When Made	406 Price Agreement Where Made
(ix)	On or about August 11, 1925	New York, New York	1 meter coincidence range finder	Unknown	$950	See Exhibits attached		Q. & R.	
(x)	On or about June 30, 1925	Brazil	12-foot coincidence range finders	Brazil Naval Commission	$3,420 each	See Exhibit attached		S	

17. Bausch & Lomb has refused to permit the following persons, firms and corporations to engage in the production and distribution of military optical equipment outside of the United States or to use any of the devices, information, machinery or equipment of Bausch & Lomb for such production and distribution, as alleged in paragraphs 17 (e) and 22 (e) of the indictment: (Such instances are presently known to the Government and the Government reserves the right to prove other instances if information regarding the same becomes available to the Government before the trial.)

136

	(a)		(b)	(c) and (d)
	When	*Where*	*Name of Person*	*Substance of refusal, and readiness, willingness, and ability of applicants*
(i)	On or about July 1, 1938	New York City	Standard Telephones and Cables, Ltd. of London, England.	Refusal set forth in letter annexed as Exhibit T. William E. Leigh indicated readiness and ability on June 30, 1938, at Rochester.
(ii)	1938	Rochester	Military representative of British government	Oral, by such military representative.
(iii)	End 1937 or early 1938	Rochester	Military representative of Italian government	Oral, by such military representatives.

137

411

410

409

136

18. Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented to such sale, as alleged in paragraphs 17 (f) and 22 (f) of the indictment, in the following instances: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, or records of Zeiss or of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such other instances from such other records.)

	When	*Where*	*Instruments*	*Name of Prospective Buyer*
(i)	On or about July 5, 1922	Jena, and New York	One heliograph	Fergus Electric Co
(ii)	On or about November 7, 1929	The Hague Holland	Periscopes	United States of America
(iii)	On or about January 25, 1930	Paris, and The Hague	Range Finders	Electric Boat Company

19. Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb, as alleged in paragraphs 17 (f) and 22 (f) of the indictment. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances from other records of Bausch & Lomb, records of Zeiss, and records of the defendant Carl Zeiss, Inc.

	When (a)	Where	Instruments (b)	Vendee (c)	Price	Bausch & Lomb Consent When Where Obtained (d)	Price Agreement When Where Made (e)
(i)	On or about March 7, 1928	Jena/ The Hague	Submarine Periscopes	United States Government	$275/ 200 each	See Exhibit U attached.	
(ii)	On or about April 4, 1928	Jena/ The Hague	1 Stereo Altimeter 4-meter base	United States Naval Attache at The Hague	$10,500	Facts solely within defendant's knowledge, and presently unknown to Government	
(iii)	On or about Sept. 18, 1935	Jena/ Berlin	1 Flak-visior	Military Attache of United States at Berlin	$3630	Facts solely within defendant's knowledge, and presently unknown to Government	
(iv)	On or about March 1, 1938	Groton Conn./ Jena	Submarine Periscopes	Electric Boat Company	Unknown	See Exhibit V attached	Facts solely within defendant's knowledge, and presently unknown to Government

20. (a) In July or August 1936, Zeiss refused to permit the Bendix Aviation Corporation to use any of its devices,
418 knowledge, instruments and equipment for the production and distribution of military optical instruments in the United States in competition with Bausch & Lomb.

(b) and (c) See paragraph (a) above.

(d) Bendix's representative in Europe, Francis Stanton, indicated his readiness, willingness and ability to compensate Zeiss for such use. The instance set forth above is the only instance presently known to the Government and is based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. Other
419 instances may be disclosed by other records of Bausch & Lomb, of Zeiss, and of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.

21, 26. Carl Zeiss, Inc., subsequent to on or about December 11, 1925, has refused to sell military optical instruments for use in the United States, as alleged in paragraph 17 (h) of the indictment, in a number of instances. The names of the prospective purchasers, the dates of the refusals, and the exact nature of the military optical instruments are presently unknown to the Government.

22. Bausch & Lomb refused to sell military optical instru-
420 ments to prospective purchasers if such instruments were eventually to go out of the United States of America as alleged in paragraph 19 (a) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

	When	*Where*	*Instruments*	*Name of Prospective Buyer*
i	On or about February 26, 1940	New York City	Height Finders	American Ordnance Corp.
ii	On or about December 12, 1939	New York City	2 and 4 meter Range Finders	Hoepli & Co.
iii	On or about November 6, 1939	New York City	3 Range Finders	Aviation Equipment & Export Co.
iv	On or about January 6, 1939	New York City	1) 8 Goniometers Graduated in Mills 2) 2 Squares 3) 2 Telescopes for Battery Commanders 4) Prismatic Compasses 5) 2 Field Glasses 6) 2 Telemeters, one meter base 7) 2 Telescopic, indexed quadrants 8) 2 Circumferentors with Tripods 9) 2 Modern Telephone Communicating Systems	Frank Sheridan Jonas

23. Bausch & Lomb has refused to enter into arrangements whereby the information, knowledge, equipment, and
424 machinery of Bausch & Lomb would be sold or employed in the manufacture of military optical instruments intended for use outside the United States as alleged in paragraph 19 (b) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances presently unknown to the Government and the Government reserves the right to prove such other instances.)

(a), (b), and (c). Bausch & Lomb refused to enter into
425 such an arrangement with William E. Leigh, of New York City, acting on behalf of Standard Telephones and Cables, Ltd., of London. Refusal was in writing by letter dated July 1, 1938 addressed to Mr. Leigh in New York City and a copy of this letter is annexed hereto as Exhibit T. This refusal took place after negotiations were had by Mr. Leigh first with representatives of Bausch & Lomb in New York City, and later with representatives of Bausch & Lomb, including the defendant Bausch, in Rochester.

24. Zeiss has shipped and Bausch & Lomb has received military optical instruments through the Port of New York as alleged in paragraphs 19 (c) and 24 (a) of the indictment
426 in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, the records of Zeiss, and the records of Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.)

Zeiss Shipment		*Bausch & Lomb Receipt*				*Price Agreement*	
When	*Where*	*When*	*Where*	*Instruments*	*Prices*	*When*	*Where*
On or about September 15, 1928	Venlo/ Rotterdam, Holland	On or about September 25, 1938	New York	One 8 meter Stereo Telemeter	Price to United States Government approximately $24,460.00	Full knowledge as to circumstances surrounding defendants' agreement as to prices is in possession of defendant Bausch & Lomb.	

25. (a) and (b) Zeiss has collected and received from Bausch & Lomb royalty payments as alleged in paragraphs 19 (d) and 24 (b) of the indictment. The royalty payments were made by check or draft drawn by Bausch & Lomb on its own bank payable to and deposited with The Chase National Bank of the City of New York, 18 Pine Street, New York City, for the account of Zeiss, in the years 1938 and 1939, and for the account of Nederlandsche Instrumenten Compagnie (Nedinsco), a wholly owned subsidiary of Zeiss, in the year 1937, on the dates set forth below as royalty for the calendar year stated:

Royalty Period	*Date of Payment*	*Total Royalty Payable*	*Amount Paid*	*Amount deducted by Bausch & Lomb, including amount withheld for U. S. Tax*
1936	May 5, 1937	$42,140.37	$35,819.31	$6,321.31
1937	April 14, 1938	46,417.32	39,454.72	6,962.60
1938	July 20, 1939	41,209.74	34,714.92	6,494.82

26. Carl Zeiss, Inc., has refused to sell military optical instruments for use in the United States as alleged in paragraph 19 (e) of the indictment, on one or more occasions. The names of the prospective purchasers, the dates of the refusals and the exact nature of the military optical instruments are presently unknown to the Government.

Samuel S. Isseks,
SAMUEL S. ISSEKS,
Special Assistant to the Attorney General,
Attorney for the United States of America.

Office and Post Office Address,
Room 2101, United States Court House,
Foley Square,
Borough of Manhattan,
New York, New York.

Dated, New York, April 26th, 1940.

EXHIBIT A ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

This Exhibit is an agreement dated April 28, 1921, written in the German language, a translation of which follows as Exhibit B. 433

EXHIBIT B ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

Translated WM*EC
November 4, 1926

Agreement between the firm of Carl Zeiss, in Jena and the firm of Bausch & Lomb Optical Co., in Rochester: 434

Paragraph 1.

The firm of Carl Zeiss agrees to assist the firm of Bausch & Lomb in the sphere of Military instruments (Army and Navy) in the manner that:

a.) It places at the disposition of the firm of Bausch & Lomb all of the drawings and other supporting data necessary for the manufacture in America;

b.) It participates in the scientific and constructive improvement of existing instruments as well as in the development of new designs and problems with the same amount of interest as it would bestow on its own tasks; 435

c.) It places at the disposition of the firm of Bausch & Lomb, manufacturing rights for the United States of America for all existing inventions and industrial pro-

Dated, New York, April 26th, 1940.

tected rights (note of translator: "patent rights") and those that out of the joint labor may still be created;
436 (in this connection new patents in the United States in the Military line shall not be acquired in the name of the firm of Carl Zeiss, but for its account in the name of the firm of Bausch & Lomb);

d.) It assists in the engagement of the proper scientific and technical personnel and if desired will temporarily send some of its higher officials to America (traveling expenses for account of Bausch & Lomb).

Paragraph 2.

437 In return the firm of Bausch & Lomb agrees to pay to Carl Zeiss a royalty on its total gross earnings in the Military line within and without the U. S. A. In this is comprised every shipment to Army and Navy authorities, as well as every sale of Military instruments to dealers and individual Military personages.

Exempt are field glasses, unless these form parts of other Military instruments or become Military instruments by the addition of special devices.

The royalty is calculated from the net invoice amount for the instruments furnished during the existance of this agreement. During the first seven years it amounts to 7%, in the
438 consecutive seven years to 6%, and then it is reduced consecutively each year by ½% to ½% in the twenty-fifth year. The reduction below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existance of the patent, unless, that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 3.

B. & L. obligate themselves not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 439

Paragraph 4.

In furtherance of the aims of this agreement B. & L. in Rochester will create a new Department solely responsible to the Board of Directors, which is charged with the independent development of all scientific and technical tasks within the Military scope and the maintenance of connections with Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department. 440

Paragraph 5.

Workmen and employees of one party cannot even within one year after leaving the services, be employed by the other party, unless with the consent of the first party.

Paragraph 6.

441

Within the sphere of non-military articles both parties are in free competition in the World's markets (inclusive of North America and Europe) during the existance of this contract. They shall, however, endeavor to give due consideration to one another relative to their common interests,

as may develop from the close co-operation in the Military line and they make the reservation of coming to special agreements regarding respective territories and non-military
442 articles. In particular they will place new projects at the disposition of each other under royalty agreements.

Paragraph 7.

Both parties shall, in the Military line of instruments and in all other lines of endeavor, where they co-operate technically within the provisions of this agreement, exchange their manufacturing experience and give access to the workshops to confidential representatives of the other party. They shall take care, in this connection, that the advantages gained
443 from the co-operation shall not be shared by third parties, not concerned. Therefore, each party shall place at the disposition of the other, inventions in the Military line, acquired from a third party under the same favorable conditions under which it, itself, is making use of them.

If Bausch & Lomb should acquire patent rights not resulting from the Zeiss co-operation (paragraph 1c) but independent, therefrom, from employees of Bausch & Lomb, these patents also shall be at the disposition of Carl Zeiss or of such enterprises in which Carl Zeiss is interested with at least one third of the capital stock, for the territory outside of the United States against the payment of a royalty of
444 4%, during the existance of the patent.

Paragraph 8.

The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 9.

The contracting parties agree to keep the fore-going agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances. 445

Paragraph 10.

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist.

(Provision in letter of Apr. 28th.) 446

Paragraph 11.

This agreement enters into force with the first of May 1921, and continues until April 30, 1941, providing however for the continuance of the royalty payment according to paragraph 2.

Paragraph 12.

If, by reason of unforseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for that time and upon an appeal the board of arbitrators shall make such dispositions as seem necessary in order to carry out the will of the parties to this agreement under the changed conditions, as far as possible. 447

Exhibit B Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 13.

448 In the case of differences of opinion, regarding the interpretation or execution of this agreement, between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as President. Only such persons are elligible to function as arbitrators, who from the beginning of the dispute have not been personally interested and are in no way employed by either party.

Jena April 28, 1921

449 BAUSCH & LOMB OPTICAL CO.
(signed) per Geo. N. Saegmuller, Vice Pres.

CARL ZEISS
(signed) PPA Dr. Ing. Bauersfeld

(signed) Kotthaus

450

EXHIBIT C ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

Translated WM EC
November 5, 1926 451

Supplementary agreement to the Agreement of April 28, 1921, between the firm of Carl Zeiss, in Jena and the firm of Bausch & Lomb Optical Co., Rochester.

In paragraph 2, the third paragraph receives the following wording:

The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then con- 452
secutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) durirng the existance of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa 453
Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:

In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States,

one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal
454 price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The Firm of Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

455 In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case
456 of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

Jena, June 27, 1925

CARL ZEISS
(Signed) P.PA. Kotthaus

Rochester,

BAUSCH & LOMB OPTICAL CO.
(Signed) Carl F. Lomb
Vice Pres.

EXHIBIT D ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL CO.

457

Translated WM*EC
November 1, 1926

Supplementary Agreement to the Agreement of April 28, 1921, between the firm of Carl Zeiss in Jena and the firm of Bausch & Lomb Optical Co., Rochester.

In paragraph 2, the third paragraph receives the following wording:

458 The premium will be calculated from the net invoice amount for the instruments furnished during the existance of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existance of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

459

The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:

Exhibit D Annexed to Bausch & Lomb Bill of Particulars.

In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one
460 party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The firm of Bausch & Lomb besides, has to pay to
461 the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In case the inquiries referred to in paragraph 2 and 3 should not come to Bausch & Lomb from a Government, but exceptionally from a commercial house of a country outside of the United States, the firm of Bausch & Lomb is to communicate immediately with the firm of Nedinsco, and, depending on the situation at Nedinsco, either, to make the protective offer named to her by the latter firm, or, to decline the inquiry under pretense. The information in question will be given to the Firm of Bausch & Lomb by the firm of Nedinsco.

462 In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured hereto-

fore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb. 463

Under the provision of paragraph 3, for the protective offer, only the normal price fixed by the firm of Carl Zeiss is subject to royalty payment, whereas the increase above the normal, to be turned over to the latter firm, is not subject to royalty.

In case that the firm of Bausch & Lomb cannot meet the normal price fixed by the firm of Carl Zeiss, but shall be forced in consequence of the higher cost of production to demand more, this increase, besides the normal price, is subject to royalty, whereas the increase to be paid to the firm of Carl Zeiss on the normal price is not considered subject to royalty. 464

If a commission to an agent is to be paid, which as far as possible should be denied, but which nevertheless in certain cases cannot be avoided, this commission, calculated into the selling price, is also subject to royalty payment.

If the firm of Bausch & Lomb is furnishing to American shipyards, optical instruments as equipment for a ship of a country outside of the United States, all instruments in which the ideas of construction of the firm of Carl Zeiss have been used, shall, besides the trade name of Bausch & Lomb, be engraved with the designation, "System Nedinsco-Zeiss". Instruments according to the construction of 465

Exhibit E Annexed to Bausch & Lomb Bill of Particulars.

Bausch & Lomb shall bear only their name. On instruments furnished by Nedinsco the name of Nedinsco will
466 appear next to the name of Bausch & Lomb.

Jena, October 28, 1925
PPA Carl Zeiss

(Signed) Frostmann

Rochester, Dec. 11, 1925
BAUSCH & LOMB OPTICAL CO.

(Signed) Carl F. Lomb
Vice Pres.

EXHIBIT E ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

467 This Exhibit is an agreement dated November 26, 1926, written in the German language, a translation of which follows as Exhibit F.

468

EXHIBIT F ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

AGREEMENT BETWEEN CARL ZEISS, JENA

469

and

BAUSCH & LOMB OPTICAL COMPANY OF ROCHESTER, N. Y., U. S. A.

Paragraph 1

The firm of Carl Zeiss agrees to assist the Bausch & Lomb Optical Company in the production and sale of Military instruments as follows:

470

(a) It will place at the disposal of the Bausch & Lomb Optical Company all of the drawings and other supporting data necessary for the manufacture in America:

(b) It will participate in the scientific and structural improvement of existing instruments as well as in the development of new designs and the solution of new problems with the same amount of interest that it would bestow on its own work.

(c) It will place at the disposal of the Bausch & Lomb Optical Company, manufacturing rights (patent rights) in the United States of America for all existing inventions and protected processes as well as those inventions and processes that may in the future be created by the joint efforts of the firm of Carl Zeiss and the Bausch & Lomb Optical Company. New pat- 471

ents in the United States in the Military line will not be acquired in the name of Carl Zeiss but at its ex-
472 pense in the name of the Bausch & Lomb Optical Company.

(d) It will assist the Bausch & Lomb Optical Company in the employment of proper scientific and technical personnel and if desired, will send temporarily, some of its high officials to America, traveling expenses to be paid by the Bausch & Lomb Optical Company.

Paragraph 2

In return, the Bausch & Lomb Optical Company agrees
473 to pay to the firm of Carl Zeiss, a royalty on its total sales in the Military line within and outside the United States of America. In this total, all sales of Military instruments to the Army and Navy authorities, to dealers and individuals are to be included.

Field glasses are exempt unless they form parts of other Military instruments or become Military instruments by the addition of special devices.

For the first ten years, this royalty, which will be calculated from the net invoice amounts of the instruments furnished during the existence of this agreement, will be 7%, for the next seven years 6% and it will thereafter be reduced
474 by ½% each year to 2% in the 25th year. There will be no reduction in the rate of royalty below 6% in the case of patented instruments during the existence of the patent unless the patent relates to parts of secondary importance only, in which case the parties shall come to an agreement as to the proper reduction (see Paragraph 1, article c).

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 3

The license hereby granted is exclusive, the firm of Carl Zeiss agrees that it will grant no license to another American manufacturer. 475

Paragraph 4

In furtherance of the aims of this agreement, the Bausch & Lomb Optical Company in Rochester will create a new Department responsible solely to the Board of Directors, which is charged with the independent development of all scientific and technical tasks within the Military scope and the maintenance of associations with the firm of Carl Zeiss in Jena. The parties will come to an agreement as 476 regards the heads to be placed in charge of this department.

Paragraph 5

Neither party will, without the consent of the other, employ persons who have left the service of the other within one year.

Paragraph 6

In the production and sale of non-military articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. They shall, however, 477 endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special agreements may be made regarding territories on non-military articles. New projects may be placed at each other's disposal under royalty agreements.

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 7

478 Both parties shall, in the Military line and in all other lines, where they cooperate technically within the provisions of this agreement, exchange their manufacturing experience and give access to their respective manufactories to each others confidential representatives. In this however, they shall use every precaution that the advantages thus gained shall not be shared by disinterested third parties. Inventions in the Military line which may be acquired by either party from a third party shall be placed at the disposal of the other under the same conditions under which they are acquired. If the Bausch & Lomb Optical Company should acquire patent rights not resulting from the Zeiss cooperation but independent therefrom, from its own employees, these patents shall also be placed at the disposal of Carl Zeiss or of such enterprises in which Carl Zeiss is interested to the extent of owning at least ⅓ of the capital stock, for the markets outside of the United States, Zeiss or its affiliated company to pay the Bausch & Lomb Optical Company royalty of 4% during the life of the patent.

479

Paragraph 8

480 The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

Paragraph 9

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Proviso in letter of Apr. 28th, 1921)

Exhibit F Annexed to Bausch & Lomb Bill of Particulars.

Paragraph 10

This agreement is effective as of May 1st, 1921 and continues in force until April 1st, 1941, with the reservation of 481
the prolongation of the license (paragraph 2).

Paragraph 11

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for such time as is necessary and upon an appeal, a board of arbitrators as subsequently designated, shall make such dispositions as may seem necessary to carry out as far as possible, the will of the parties to this agreement, 482
under the changed conditions.

Paragraph 12

In the case of differences of opinion, regarding the interpretation or execution of this agreement between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as Chairman. The decision of the arbitrators on any question submitted to them shall be final and conclusive between the parties. Only such persons are eligible to function as arbitrators, who are 483
not personally interested in the outcome of the dispute and not employed in any way by either party.

Rochester, N. Y. November 26, 1926

Bausch & Lomb Optical Company
Carl F. Lomb, Vice-President

Carl Zeiss, Jena December 24, 1926

EXHIBIT G ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

484

(See Opposite) ☞

485

486

y fcy 146
3/2/71 mm

Mil. Boot. 382

April 29, 1936

Carl Zeiss
Jena, Germany

Attention of Mr. Bouffer.

Dear Sir:

The Argentine Naval Commission of the United States located in Washington, D.C. has sent us an inquiry to the effect that they are interested in the procurement of from one to six Height Finders of 4 m base including mount in accordance with U.S. Army Specifications. We, therefore, took occasion to cable you today, as per copy inclosed, reading as follows:

HIERIGE ARGENTINISCHE MARINE KOMMIS ION ANTRAGT EINS BIS SECHS MOMENTANS:ER VIER METER BA AERMETIP BRABSICHTIGEN STAFFELPARISARGECHT SECHSUNDZWANZIG BIS ZWEIUNDZWANZIGTAUSEND DOLLAR KABELT EINVERSTANDNIS

We now await your reply.

Very truly yours,

WM:FC

BAUSCH & LOMB OPTICAL CO.

487

488

489

EXHIBIT G1 ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

490

BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS "BAUSCHLOMB" ROCHESTER

CLASS OF SERVICE	SIGNS
Charge xx	DL-Day Letter
Collect	NM-Night Message
Day Letter	NL-Night Letter
Night Letter	LCO-Deferred Cable
Night Message	NLT-Cable Letter
Serial Service	SER-Serial Service
Straight Telegram	WLT-Week-End Letter

491

Cable xxx
Sent via W. U. Postal

AUGUST 20, 1934

LCD
ZEISSWERK JENA

RUSSLAND ANFRAGT HOEHENMESSER VIER METER SCHLAGEN VOR ANZUBIETEN EIN INSTRUMENT FUENFUNDZWANZIG TAUSEND DOLLAR DREI INSTRUMENT JE VIERUNDZWANZIG DOLLAR PUNKT KABELT EINVERSTAENDNIS

MILITARY DEPT.

492

This telegram is sent in accordance with outlines on back of regular telegram blank

BY DIRECT WIRE FROM

WESTERN UNION

BHG98 VIA RCA=CD JENA 9 30 1751 LC

BAUSCHLOMB=ROCHESTER (NY)=

AUSNAHMSWEISE EINVERSTANDEN ANGEBOTSABGABE ZU GENANNTEN PREIS.

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

EXHIBIT H ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

493

494

495

EXHIBIT H-1 ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

496

(See Opposite) ☞

497

498

military

BY DIRECT WIRE FROM 4 Aug 1940 3/14/044

WESTERN UNION

CLASS OF SERVICE

This is a full-rate Telegram or Cable-gram unless its de-ferred character is in-dicated by a suitable sign above or preced-ing the address.

SIGNS

DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The time shown in the date line on full rate telegrams and day letters, and the time of receipt at destination as shown on all messages, is STANDARD TIME.

RHE1 VIA RCA=CD JENA B AUG 21 1044

BAUSCHLOMB=ROCHESTER (NY):

=PREISE HOEHNMESSER 4 M HUSSLAND EINVERSTANDEN.

9277

8/21/39 1 $25,000.00

3 $24,000.00 ea.

8/31 9/1

THE QUICKEST, SURE AND SAFEST WAY TO SEND MONEY IS BY TELEGRAPH OR CABLE

499

500

501

EXHIBIT I ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

BAUSCH & LOMB OPTICAL COMPANY

502 ROCHESTER, N. Y.

CABLE ADDRESS "BAUSCHLOMB" ROCHESTER

CLASS OF SERVICE		SIGNS
Charge	xxx	DL-Day Letter
Collect		NM-Night Message
Day Letter		NL-Night Letter
Night Letter		LCO-Deferred Cable
Night Message		
Straight Telegram		XNLT-Cable Letter
Cable	xxxx	WLT-Week-End Letter

503 Sent via W. U. Postal

NOVEMBER 27, 1933

NLT

ZEISSWERK JENA

ELECTRIC BOAT COMPANY ANFRAGT ZWEI ENTFERNUNGSMESSER BESTIMMUNGSLAND UNGEMANNT BEABSICHTIGEN ANZUBIETEN FUENFZEMN FUSS STERBO MARINENODELL STURKPHEIS NEUNTAUSEND FUENFHUADERT DOLLAR KABELT EINVERSTAENIMIS

BAUSCHLOMB

MILITARY DEPARTMENT

504

BY DIRECT WIRE FROM

WESTERN UNION

CLASS OF SERVICE

SIGNS
DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

RHE5 VIA RCA=CD JENA 11/10 NOV 28 NLT

BAUSCHLOMB=ROCHESTER (NY)=

EUER GESTRIGES TELEGRAMM ENTFERNUNGMESSERANFRAGE MIT ANGEBOT EINVERSTANDEN.

Quote to Electric Boat Company $9500.00 per C.B. who called V.B.D. who agreed to this price.
D.H.W. Nov 28 33.

WESTERN UNION GIFT ORDERS ARE APPROPRIATE GIFTS FOR ALL OCCASIONS

EXHIBIT J ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

505

506

507

EXHIBIT K ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

508

(See Opposite) ☞

509

510

[redacted] INSTRUMENTEN COMPAGNIE

„NEDINSCO"

YJE 127

TELEFOON: VENLO 033
TELEGR.-ADRES: NEDINSCO-VENLO
A.B.C. CODE 5e ED.
MORSE CODE

VENLO (HOLLAND), [redacted]
POSTBUS 40 29. November 1933

H/VIII/6197 Dr/Vy

Betr. Ihr Telegramm v.21.11.33.

Betr. 4 m Höhenmesser Siam.

Firma

Bausch & Lomb

Rochester.

Wir bestätigen Ihnen den Eingang des obigen Telegramms:

„Siam anfragt Preis einem Höhenmesser vier Meter Spezialstativ verwendbar mit Sperry Rechengerät. Vorschlagen anzubieten unseren Höhenmesser zu vierundzwanzigtausendeinhundert Dollar kabelt Einverständnis."

welches wir telegrafisch wie folgt beantworteten:

„As per your telegram of 20th inst. agree with offer Siam."

Sie wollen daraus ersehen, dass wir damit einverstanden sind, dass Sie an die Behörde in Siam den Höhenmesser zu den von Ihnen genannten Preis anbieten.

Hochachtungsvoll

n.d.N. V. Nederlandsche
Instrumenten-Compagnie
„NEDINSCO"

511

512

513

EXHIBIT L ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

514

(See Opposite) ☞

515

516

BY DIRECT WIRE FROM

WESTERN UNION

CLASS OF SERVICE

This is a Telegram or Cable-gram unless the character thereof is indicated by a suitable sign above or preceding the address.

SIGNS

DL = Day Letter
NM = Night Message
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on full rate telegrams and day letters, and the time of receipt at destination or check on all messages, is Standard Time.

RHGB6 VIA RCA=CD JENA 4 21 1755

BAUSCHLOMB=ROCHESTER (NY)=

ZMUDZAXBUT WOJPAXHJIB.

As per your telegramm of 20th inst. agree with offer Siam

THE QUICKEST, SUREST AND SAFEST WAY TO SEND MONEY IS BY TELEGRAPH OR CABLE

EXHIBIT M ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

520

(See Opposite) ☞

521

522

N. V. NEDERLANDSCHE [redacted] COMPAGNIE

„NEDINSCO"
Br/El
№ 9865

Ihr Telegramm vom 10.3.28

DEN HAAG, den 16. März 1928
POSTBOX 191

Firma Bausch & Lomb, Optical Company

Rochester

Wir bestätigen den Eingang Ihres Telegramms:

BIACP	=	Have an inquiry for (-) from (-)
VEIBI	=	10
ZOEBO	=	to
VEBIE	=	16
GALEPUBNTP	=	Boresights
BRABBOVII	=	Brazilien
VIAAMORBOS	=	via Amerika
HARCESCO	=	Marine Department
OCKCI	=	exactly as (-)
ZONIB	=	Type
ZEIPB	=	as previously supplied
ZOSPB	=	to them
BEPOB	=	and to
ZINOZ	=	our
HARCESCO	=	Marine Department
VESLA	=	We propose
ZEVAZ	=	to supply
BIESE	=	diese
ZIOEB	=	ourselves
ZIBBE	=	at following price
ZVIKO	=	$ 180.—
ZOBUV	=	Please telegraph
ZIGVI	=	agreement
ZIBBP	=	stop
ZINOLI	=	As per your telegram of 8th inst.

523

524

525

Exhibit M Annexed to Bausch 3 Lomb Bill of Particulars.

(See Opposite) ☞

AIBOE = agree to the proposal
IJSEF = proceed

YESSO = quotation
ARMEE = Brass.

Die Bezeichnung = GALEPSEHEP = haben wir nach unserem Code übersetzt in = Voresighte =. Wir können aber auch mit diesem Ausdruck nichts anfangen, da wir nicht wissen, was tatsächlich damit gemeint ist und wir haben deshalb bei Ihnen zurückgefragt wie folgt:

ENOSE = as per your telegram of the 19th inst.
FEOSE = what is the meaning of

GALEPSEHEP = Voresighte.

Hochachtungsvoll

N.V. Nederlandsche
Instrumenten Compagnie
voor de Directie

529

530

531

EXHIBIT N ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

532

(See Opposite) ☞

533

534

POSTAL TELEGRAPH - COMMERCIAL CABLES

TELEGRAM

FY Pilo Carl Zeiss JENA MARCH 26 19 28

BAUSCH & LOMB OPTICAL CO

ROCHESTER N Y

BETOXHRBOV GALEPÚBMTP BRANNOVII

We hereby give Consent

Offer

Bausch

Pfaye.

Mabitang

535

536

537

EXHIBIT O ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

COPY OF TELEGRAM FOR FILE

538 BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS:
"BAUSCHLOMB" ROCHESTER

DECEMBER 30, 1925

ZEISSWERK JENA

Classification

COGNYOIROZ LYACS FY UNOCCABU OHNEFABULA NOCHBIBO HEXMECOFME OTIEXLYGLE

Translation:

539

COGNY	:	U. S. of America
OIROZ	:	Shipyard
LYACS	:	Have written for quotation
		YFY:YFY
UNOCCABU	:	UNOCCABU
OHNE	:	Ohne
FABULA	:	Fabula
NOCH	:	Noch
BIBO	:	Bibo
HEXME	:	Intended for
COFME	:	Peru
OTIEX	:	Telegraph at once
540 LYGLE	:	What are we to quote

N.V. NEDERLANDSCHE INSTRUMENTEN COMPAGNIE.

DIRECTIE: DEN HAAG. JAVASTRAAT 44. TELEFN.: 10170. 71 TELEGR.-ADR.: NEDINSCO-HAAG A. B. C. 6th ed. FABRIEK: VEMLO MOLENBROEKSTR. B 13 TELEFN. 000

„NEDINSCO"
Br/El
F° 27/4789

DEN HAAG, den 31. December 1925
POSTBOX 181.

Ref.: Ihr Telegramm vom 30.12.25

Betr.: Anfrage nach Eboots-Zielfernrohren.

4 C 19

JAN 5

Firma Bausch & Lomb, Optical Company

Rochester.

1/1 1/1

Vereinigte Staaten Nordyork

Wir bestätigen den Eingang Ihres Telegramms:

COCEIOIROS	=	Basutoland Shipyard (!)
LIACS	=	Have written for quotation
UFU	=	2
BIOCCABU	=	Eboots-Zielfernrohr 5X mit einem Okular
ohne	=	ohne
FABELA	=	Farbglas
BOCEBIBO	=	Nachtbeleuchtung
EEIENE	=	intended
COPNE	=	Peru
OFIEI	=	telegraph at once
ZIGLE	=	what are we to quote for

worauf wir Ihnen wie folgt drahteten:

Ebique	=	Eboots-Zielfernrohr 10
lycee	=	if you quote make piece as follows
nonef	=	$ 375.—/

Bei der Preisberechnung haben wir, wie Sie aus unserem Antworttelegramm entnehmen wollen, unser Eboots-Zielfernrohr C/10 zu Grunde gelegt, mit einem Sicherheitszuschlag von 10%.

N.V. Nederlandsche Instrumenten-Compagnie

EXHIBIT P ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

541

542

543

EXHIBIT Q ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

COPY OF TELEGRAM FOR FILE

544 BAUSCH & LOMB OPTICAL COMPANY
ROCHESTER, N. Y.

CABLE ADDRESS:
"BAUSCHLOMB" ROCHESTER

JULY 24, 1925

ZEISSWERK JENA

Classification

RIACPUKBAI ELOQUENS SBRUGAWHIL FIUDTZVIST YJOTGVAODA
BAUSCHLOMB

Translation:

	RIACP	: Have an inquiry for
545	UKBAI	: 1 meter
	ELOQUENS	: Eloquens
	SBRUG	: Japanese
	AWHIL	: Agent
	FIUDT	: Commercial
	ZVIST	: Vessel
	YJOTG	: What price shall we ask for
	VAODA	: One

546

Offer No. [redacted]

To Bausch & Lomb Optical Co.,

Rochester.

Country:	Price	
	Currency: USA $	
Referring to your enquiry Mil.Dep.9986 of July 25th 1945 we have the honour of making the following offer:	each	total
Subject:		
Coincidence Rangefinder for Navigational purposes Base length: 1 meter magnifying power: 11-diam. provided with Astigmatiser, coloured glasses, electrical illumination of the scale, electric battery, adjusting lath, belt mounting, wooden case	990.--	
according to the annexed list of delivery: XVII-4		
according to pamphlet:		
ordering at the same time 10 pieces		
For completing the outfit we recommend ordering at the same time the following articles:		
Rail Mounting	20.--	
Book " with a Polorus Ring	100.--	
Our prices are quoted:		
fob Rotterdam, not without discount		

EXHIBIT R ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

547

548

549

Exhibit R Annexed to Bausch & Lomb Bill of Particulars.

550

(See Opposite) ☞

551

552

Time of delivery: 10 pieces 12 months

from works and after date of order or after clearing up all special questions respectively.

This period is fixed according to our stock and the manufacturing conditions of today and cannot be binding.

Binding agreements with regard to the period of delivery can only be made on the day that the order is finally given.

Packing dimensions and weights per piece:

Number of cases: ——— piece

Outer measurements about: ——— cub. meter Net weight about: ——— Kilos.

Gross weight about: ———

Shipping instructions:

Detailed instructions concerning the addressing, marking and shipping to be sent together with the order. Formulars for this purpose are supplied by us if necessary.

Terms of payment:

———

Date of validity of this offer till:

November 15th 1935

Special remarks:

CZ-Comm - 1515/3-5

Den Haag, 11th August, 1935.

N.V. Nederlandsche
Instrumenten-Compagnie
voorh. De Stuurs

Ohm

553

554

555

EXHIBIT S ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

(Postal Telegraph Form)

556 72nyq
78NYGC 14 VIA RADIO
JENA JUN 30 935AM

BAUSCH-LOMB
ROCHRNY

ACILISENE OBROKYCFPY ELOQUENS BRANNOVII QUOJORUM OUTRIDER OUTCEPT STAMEN OUTMASTER PEGAJOSO DOWNBEARD ABRIPUISTI

755A

Translation:

557	ACILISENE	:	The agreement is signed
	OBROK	:	We beg to offer the following
	YCFPY	:	12 ft.
	ELOQUENS	:	Coincidence Range Finders
	BRANNOVII	:	Brazil
	QUOJORUM	:	You may quote
	OUTRIDER	:)	$3420.00
	OUTCEPT	:)	
	STAMEN	:	Stand
	OUTMASTER	:	$800.00
	PEGAJOSO	:	Price includes
	DOWNBEARD	:	20%
558	ABRIPUISTI	:	According to agreement

BAUSCH & LOMB OPTICAL CO.

ROCHESTER NEW YORK

July 1, 1938

Mr. William E. Leigh
International Standard Electric Corp.
67 Broad Street
New York, New York

Dear Mr. Leigh:

One of the first steps I took in giving consideration to your proposition which we discussed yesterday was to look into the contractual arrangements to which we are already obligated which I spoke to you about in my conversation.

Our attorneys tell us that we are absolutely tied up in a way that will prevent our giving you the type of assistance you need to get into the manufacture of optical fire control instruments. My thought was that events over the last few years had changed our foreign relationship in a way that might allow us to work with you, but I am definitely satisfied now that such is not the case. Because of this situation, there is no need for us to delay you any further in your plan.

I enjoyed very much your visit here and perhaps at some future occasion I may have the opportunity of meeting you again.

Very truly yours,

BAUSCH & LOMB OPTICAL CO.

Carl L Bausch.

CLBausch:MB

EXHIBIT T ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

559

560

561

EXHIBIT U ANNEXED TO BAUSCH & LOMB BILL OF PARTICULARS.

No. 5146 March 7, 1928

562 Messrs. Carl Zeiss
Jena,
Germany.

Attention: Mr. Forstmann
Subject: Submarine Periscopes
Reference—Your letter Br/Kl No. 7768
of February 11, 1928

Gentlemen:

In answer to your letter of February 11, and your cablegram of February 25, in this respect reading as follows:

	SKAUZ	Our letter of	URREH	Modern
563	UYURY	number	SEUBUM	Sebum
	WIGVAWEHUHG	6768	ESPKY	By
	SEBUM	Sebum	NEDINSCO	Nedinsco
	RHUXF	inquiry	ZVIMX	very
	NOZYF	Embassy	OKBRA	favorable
	EEJUJ	situation	ZGHYS	to your
	BAGUE	altered	OZWUE	business in futur
	NOXYF	Embassy	ZKALX	suggest
	DIJWO	in behalf of	AKVAN	an agreement with
	FLUENTUM	Fluentum	ALEKIGS	Alexius
	NULIJ	Department	NEDINSCO	Nedinsco
	RHOIG	Inquire at	ZRKSO	will quote
564	NEDINSCO	Nedinsco	ZYNKE	with date
	ZKOWK	supply	MAXEE	of delivery
	VLIXI	3	ZVAMX	usual
	OHOLUK	?	ONYMK	foreign
	SEBUM	Sebum	IBUFS	countries
	ZYNKE	with	WEAITH	dollars
	AHUFA	accessories	YITFU	price
	WYEAY	in our opinion	NADPH	delivered F. O. B.
	ZEONK	supply	YGKLI	Rotterdam
	WOHUA	of	YATTAOHSOI	10% for you
	ZIWAM	such	ZOGUW	Please telegraph

Exhibit U Annexed to Bausch & Lomb Bill of Particulars.

We have telegraphed to our Frankfort office, March 1, 1928 the following:

Messrs. Carl Zeiss March 7, 1928 565

STAN:	In reply to telegram		
EISS:	Zeiss	SLEMK:	40
ASUK:	February 25	AIXIN:	And
SRIT:	Consider it favorable	CLEMP:	42
TMON	But	OCTA:	Including
AKTL:	Cannot decide (until)	MANOEPS:	Mancens
YCUK:	Unless we know	ADIV:	And also
UZEL	At what price do—expect to sell	OAKSK:	Separate
ESAR	Caeser	KUSSF:	Prices
ORLK:	Regulation	ALYTY:	Attachments 566
ENUMCE:	Periscopes C	AIXIV:	And also
LELT:	38	ADORI:	Accessories

and in reply to the letter have received your cablegram of March 5, reading as follows:

LTOOJ:	Can quote on as follows
ALFAY:	Attaché
SEBRUCK:	Sebum C
MORLE:	Regulation
SLENE:	40
NANCEDPS	Mancens 567
NICKELSTEEL:	Nickelsteel
AIBIS:	Composition of alloy is
RODTTETURY:	25%
DYOFY:	Diameter
OJOUD:	6 inches
IKYUD:	Length?
UKKAN:	30 ft.

Exhibit U Annexed to Bausch & Lomb Bill of Particulars.

	UOPMY:	$6000
	DONSA:	$275
568	GYPOLINE:	Gyro Line
	UOBOC:	$400
	TYIJA:	$15.00
	TRIANGLEMAGNIFIER:	Triangle magnifier
	UOMME:	$200
	UAFIX	$70.00
	DESICCATOR	Drying apparatus with motor pump
	UCMME:	$200
	EISOB:	Photographic
	CALCAR:	Camera
	CALOS:	$165.00
569	KYLIT:	Price is F. O. B.
	WEJEX:	Rotterdam
	ROGFE:	10%

This cablegram was badly mutilated. We had the telegraph company verify it and with considerable difficulty made the cablegram out as above stated.

In the meantime we telegraphed you the following on March 5:

OSZIC: Repeat unintelligible words in telegram

	BEBUM:	Bebum
570	RYOFY:	Repeat third word
	RYVAF:	Repeat ninth word
	RYVUR:	Repeat fifteenth word
	RYVUZ:	Repeat eighteenth word

and to which we have received your answer as follows:

Messrs. Carl Zeiss March 7, 1928

SEBUUCE:	Sebum C	571
SLENK:	40	
RODTV:	25%	
NICKELSTEEL:	Nickelsteel	
AVIS:	?	
EVFPI:	$275	
DESSICATOR:	Desiccator	
RATEL:	Price is (at)	
NVEMF:	$200	
KYNED:	Price includes commission	
TLLKE:	10%	

572

It will be noted that this cablegrams is also mutilated. Moreover, had it not been for the fact already stated in the above that the telegraph company was able to obtain a correction on your former cablegram, it would not have helped us in solving your other cablegram; inasmuch as evidently you have misunderstood our request for a repetition of the 3rd, 9th, 15th and 18th words in your former cablegram and have applied the meaning to the half words. It has been our experience that the repetition of the entire 10 letter code word, as originally given, eliminates confusion that might be caused by splitting the words in the repetition and, therefore, for the future kindly take notice that whenever we request the repetition of a word from abroad, we have reference to the entire 10 letter word, i.e., to combined code words, and we count the number of words of a telegram exactly as the telegraph company does when charging for the expenses thereof, i.e., we refer here to the text only and not to the address.

573

We are in agreement with the prices named in your quotation and as we are also of concurring opinion that the introduction of your type of periscope should in the end benefit us, should the Government become impressed with its

advantages, you may proceed with your quotation to the Attaché. Accordingly we telegraphed you as per copy in-
574 closed, reading as follows:

YEUFY:	Agree to proposition
YREED:	Quotation
SEBUM:	Sebum
TJUMF:	Proceed

It is evident from your report as well as from an inquiry that we have received ourselves very recently on the subject of cameras as auxiliary equipment to submarine periscopes, that the special features of foreign periscopes are receiving consideration at present. This can only find explanation in
575 two ways, either the present staff is more receptive to improvements and changes in the standard, than the personnel was when our Washington representative and we tried to introduce these features, or else the present Attaché has some influence with the Bureau in bringing these points up for consideration. Whatever the causes for this sudden interest and apparent change of attitude, it can only work out to our benefit in the course of time.

A copy of this letter is being sent to our Frankfurt Office which will inform Mr. August Lomb of what has transpired in the meantime. For the sake of record and to keep our files complete, we should thank you to send us and Mr. August Lomb a copy of your regular quotation to the At-
576 taché, so that we are fully informed of what you intend to supply and have this matter on file for future reference. You will also oblige us to keep us and Mr. August Lomb informed as regards the outcome of your quotation and any other successive arrangement that you may make in this connection with our Government.

Yours very truly,

BAUSCH & LOMB OPTICAL CO.

EM:BC
Incs.

EXHIBIT V.

February 25, 1938

Mil. Dept. 612.

577

Carl Zeiss
Militar Abteilung
Jena, Germany

Zu Handen von Herrn Neuffer.

Subject: Periscopes for Electric Boat Company.
Reference: Your letter N XIII/60256/Br/Sch.
February 16, 1938.

Gentlemen:

578

In response to your letter in reference, you are free to quote on the Periscopes referred to direct to the Electric Boat Company, inasmuch as we may presume that these Periscopes are not intended for the use of our Government, considering that we have not received such an inquiry from our Navy Department.

Yours very truly,

BAUSCH & LOMB OPTICAL CO.
S. H. W.

WM:MK

579

Zeiss Bill of Particulars.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

580

C 107-169

UNITED STATES OF AMERICA,

Plaintiff,

—*v.*—

BAUSCH & LOMB OPTICAL COMPANY, *et al.*,

Defendants.

581

The United States of America, by Samuel S. Isseks, Special Assistant to the Attorney General of the United States, its attorney, voluntarily submits the following bill of particulars, on information and belief, in answer to the demands of the defendant Carl Zeiss, Inc., embodied in the motion for a bill of particulars, dated October 18, 1940, and served upon the Government October 22, 1940.

The numbering herein follows the numbering in the defendants' motion papers.

582 1. The conspiracy and combination entered into on or about April 28, 1921, as alleged in paragraphs 2, 15, and 16 of the indictment, was on or about that date entered into by defendant Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb), its then vice president, George N. Saegmuller (now deceased), and Carl Zeiss of Jena, Germany (hereinafter referred to as Zeiss), and its officers, Dr. Ing. Bauersfeld and another named "Kotthaus."

The conspiracy and combination was in writing, and photostatic copies of a written agreement in German between Bausch & Lomb and Zeiss and an English translation of such agreement made for and by the defendant Bausch & Lomb, both produced by the defendant Bausch & Lomb before the Grand Jury in compliance with a subpoena duces tecum served upon it, are annexed hereto and marked, respectively, Exhibits A and B. 583

In addition to the express terms of the agreement as set forth in Exhibits A and B to this bill of particulars, it was agreed between defendants Bausch & Lomb and Zeiss, and the other individuals referred to who entered into the combination and conspiracy, that in the case of sales made by Bausch & Lomb or Zeiss for use in the territory exclusively assigned to the other, Bausch & Lomb and Zeiss would together fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of military optical instruments; that Zeiss would not permit any person, firm, or corporation which was engaged or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution, even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment; and similarly that Bausch & Lomb would not permit any person, firm, or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military optical instruments to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any 584 585

terms in connection with such manufacture and distribution, even though such persons, firms, or corporations were ready,
586 willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, machinery, and equipment.

The details and circumstances with regard to the entering of this conspiracy and combination are as follows:

Prior to April 28, 1921, a representative of Zeiss conferred in Rochester with officers, directors, and employees of Bausch & Lomb, including Edward Bausch, then president of Bausch & Lomb and now chairman of its board of directors, Carl F. Lomb (now deceased), William A. E. Drescher
587 (now deceased), and George N. Saegmuller (now deceased). As a result of negotiations in Rochester, said George N. Saegmuller, vice president, was designated and given full power of attorney by the directors of Bausch & Lomb to go to Germany and negotiate an agreement with Zeiss relating to military optical instruments and the division of territory in respect thereof. Said George N. Saegmuller, with his son, Frederick B. Saegmuller, then an employee of Bausch & Lomb, went to Germany and there negotiated the terms of the agreement hereinabove referred to in this bill of particulars. Said agreement provided that a separate Military Department of Bausch & Lomb would be created under the guidance of Zeiss. One Oswald H. Wolferts then left the
588 employ of Zeiss (with the consent of Zeiss) to become employed in the newly-created Military Department of Bausch & Lomb. On October 3, 1921, a committee consisting of Edward Bausch, defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Dr. O. Eppenstein, representing Zeiss, executed a memorandum in Rochester for the creation by Bausch & Lomb of a new Military Department with said Frederick B. Saegmuller at its head and said

Oswald H. Wolferts as his assistant. By the terms of this memorandum, the Military Department was to report to the Executive Committee of Bausch & Lomb through defendant M. Herbert Eisenhart, said Frederick B. Saegmuller, and Joseph F. Taylor of Bausch & Lomb.

2, 4, and 5. Military optical instruments sold by Bausch & Lomb to foreign governments and to firms, shipyards, and individuals located in States of the United States other than the State of New York, as alleged in paragraph 3 of the indictment, were sold to the following: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of defendant Bausch & Lomb, and the Government reserves the right to prove such other instances from such other records.)

(a) *When and Where Sold*	(b) *Description of Instruments and Price*		(c) *Name of Vendee*
Items (i) to (x)—See B & L, B/P p. 116.			
(xi) On or about 10/22/29	Washington, D. C.	12 gun sight telescopes	$385. each	Brazilian Government

3. Zeiss carries on the business of selling and distributing cameras, binoculars, microscopes, and other scientific optical equipment in the City of New York through the instrumentality and agency of Carl Zeiss, Inc. The particulars as to the kind and type of merchandise dealt in, bought, sold, and exchanged by Carl Zeiss, Inc., for and on behalf of Zeiss, together with the dates, nature, and terms and conditions of all contracts and agreements made or consummated by Carl

Zeiss, Inc., for and on behalf of Zeiss, and the nature and subject matter and time of any negotiations carried on by
592 Carl Zeiss, Inc., in New York, or in the United States of America, on behalf of Zeiss, are all in the possession of the defendant Carl Zeiss, Inc.; and the Government reserves the right to prove such particulars from documents, records, and notes or copies of communications between Carl Zeiss, Inc., and Zeiss, presently in the possession of Carl Zeiss, Inc.

6. The names of the different military optical instruments, of which, as alleged in paragraph 9 of the indictment, Zeiss and its subsidiary Nedinsco have been among the largest
593 manufacturers and sellers, are set forth in paragraph 1 of the indictment.

7 and 8. Prior to 1921, Bausch & Lomb and Zeiss competed with each other in the United States, England, France, Italy, Spain, Czecho-Slovakia, Yugoslavia, Roumania, Turkey, Japan, the British Dominions, Mexico, Colombia, Venezuela, Brazil, Argentina, Ecuador, Chile, Bolivia, Uruguay, Paraguay, Panama, Costa Rica, Guatemala, Honduras, Australia, New Zealand, and the United States, British, French, and Italian possessions and dependencies throughout the world in the sale of cameras, binoculars, microscopes and other scientific optical instruments, and military instruments, as
594 defined in paragraph 1 of the indictment. Further particulars as to the names and types of the particular instruments are presently in the possession of defendant Bausch & Lomb and the Government reserves the right to prove such particulars from documents in the possession of Bausch & Lomb at the time of the trial of this case.

Zeiss Bill of Particulars.

9. The documents embodying the particulars demanded in paragraph 9 were presented to the Grand Jury in response to a subpoena duces tecum served upon Bausch & Lomb. Sometime after the entry of a plea of *nolo contendere* to the indictment by Bausch & Lomb, said documents were returned to it, and are thus no longer in the possession of the Government. The Government, however, reserves the right to prove the facts alleged in paragraph 11 of the indictment through documents presently in the possession of defendant Bausch & Lomb, and in the possession of the War and Navy Departments of the United States, together with the testimony of witnesses at the time of the trial of this case. 595

10. Military optical instruments sold by Bausch & Lomb direct to Governments other than that of the United States, as alleged in paragraph 12 of the indictment, are as follows: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances shown by other records of Bausch & Lomb and the Government reserves the right to prove such other instances from such other records.) 596

Items (i) and (ii)—See B & L, B/P p. 117.

11. (a), (b), and (d). Military optical instruments purchased from Bausch & Lomb by various firms, shipyards and individuals located in the United States of America, as alleged in paragraph 13 of the indictment are those set forth under items (iii) to (xi) in paragraph 2 hereof, except that as stated in paragraph 2 hereof, there may be other instances not shown by records produced by Bausch & Lomb before the Grand Jury pursuant to a subpoena duces tecum, and the Government reserves the right to prove such other instances from other records of Bausch & Lomb. 597

(c) The instruments used in the construction of battle ships, cruisers and submarines intended for delivery to a
598 foreign country, as alleged in paragraph 13 of the indictment, formed parts of fire control apparatus of the battle ships "Rivadavia" and "Moreno", and were intended for delivery to the Republic of Argentina.

12. Military optical instruments imported into the United States through the Port of New York by Bausch & Lomb and Zeiss, as presently known to the Government, are set forth below. These instances have been disclosed by the records of Bausch & Lomb produced before the Grand Jury pursuant to a subpoena duces tecum. Many other instances may be shown by other records of Bausch & Lomb presently
599 in its possession, and the Government reserves the right to prove such other instances from such records:

Items (i) to (vii)—See B & L, B/P p. 119.

13. Carl Zeiss, Inc. entered into the conspiracy and combination, as alleged in paragraph 16 of the indictment, on or about December 11, 1925 by its knowledge, acceptance, and ratification of, and adherence to, the agreements then existing between Carl Zeiss, Jena and Bausch & Lomb, and subsequent to December 24, 1926, by its knowledge, acceptance, and ratification of, and adherence to, the agreements
600 then existing between Carl Zeiss, Jena and Bausch & Lomb, the dates and places where such knowledge, acceptance, confirmation and adherence were made and had being particularly known to Karl Bauer, present President of Zeiss, Inc. The Government reserves the right to prove such particulars at the time of the trial.

14. (a) A photostatic copy of the German agreement alleged in paragraph 17 (a) and (b) of the indictment, and

a photostatic copy of a translation of such agreement as made for and by Bausch & Lomb are attached hereto and marked Exhibits A and B, respectively. 601

(b) Such agreement was entered into on or about April 28, 1921 in Jena, Germany, and George N. Saegmuller (now deceased) acted on behalf of Bausch & Lomb.

15. (a) Copies of the agreements alleged in paragraph 17 (c) of the indictment, as translated in English by and for Bausch & Lomb, are annexed hereto and marked Exhibits C and D, respectively.

(b) The agreement of June 27, 1925 as alleged in paragraph 17 (c) of the indictment was executed on behalf of Bausch & Lomb at Rochester by Carl F. Lomb (now deceased). 602

The agreement of October 28, 1925, as alleged in paragraph 17 (c) was executed by Bausch & Lomb in Rochester on December 11, 1925 by said Carl F. Lomb.

16. (a) A photostatic copy of the German agreement alleged in paragraph 17 (d) and a translation of such agreement made for and by Bausch & Lomb are annexed hereto and marked Exhibits E and F, respectively.

(b) Such agreement was executed on behalf of Bausch & Lomb by Carl F. Lomb (now deceased).

603

17. Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales, as alleged in paragraph 17 (e) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of

Bausch & Lomb, and the Government reserves the right to prove such other instances.)

604 Items (i) to (v)—See B & L. B/P pp. 122-133.

Items (vi) to (xx)—See B & L. B/P pp. 122-133.

Items (xxi) to (xxxi)—See B & L. B/P pp. 122-133.

Items (xxxii) to (xliii)—See B & L. B/P pp. 122-133.

Items (xliv) to (liv)—See B & L. B/P pp. 122-133.

18 and 19. Bausch & Lomb since subsequent to May, 1921, has either sold or offered to sell military optical instruments for use outside of the United States, only after having first obtained the consent of Zeiss, as alleged in paragraph 17 (e)
605 of the indictment in the following instances: (The Government does not know whether in fact the offer of sale was consummated in each instance, but this is unquestionably known to the defendants. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury, pursuant to a subpoena duces tecum. The government reserves the right to prove other instances based on other records of Bausch & Lomb.)

Items (i) to (v)—See B & L. B/P pp. 134-135.

Items (vi) to (x)—See B & L. B/P pp. 135-136.

606 20. Bausch & Lomb has refused to permit the following persons, firms and corporations to engage in the production and distribution of military optical equipment outside of the United States or to use any of the devices, information, machinery or equipment of Bausch & Lomb for such production and distribution, as alleged in paragraph 17 (e) of the indictment: (Such instances are presently known to the Government and the Government reserves the right to prove

other instances if information regarding the same becomes available to the Government before the trial.)

607

Items (i), (ii) and (iii)—See B & L, B/P p. 137.

21. Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented to such sale, as alleged in paragraph 17 (f) of the indictment, in the following instances: (Such instances are presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, or records of Zeiss or of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such other instances from such other records.)

608

Items (i), (ii) and (iii)—See B & L, B/P p. 138.

22. Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb, as alleged in paragraph 17 (f) of the indictment. The instances set forth below are those presently known to the Government based on documents produced by Bausch & Lomb before a Grand Jury pursuant to a subpoena duces tecum. The Government reserves the right to prove other instances from other records of Bausch & Lomb, records of Zeiss, and records of the defendant Carl Zeiss, Inc.

609

Items (i) to (iv)—See B & L, B/L p. 139.

23 (a), (b), and (c). In July or August 1936, Zeiss refused to permit the Bendix Aviation Corporation to use any of its devices, knowledge, instruments and equipment for the production and distribution of military optical

instruments in the United States in competition with Bausch & Lomb.

610 (d) Bendix's representative in Europe, Francis Stanton, indicated his readiness, willingness and ability to compensate Zeiss for such use. The instance set forth above is the only instance presently known to the Government and is based on documents produced by Bausch & Lomb before a grand jury pursuant to a subpoena duces tecum. Other instances may be disclosed by other records of Bausch & Lomb, of Zeiss, and of the defendant Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.

611 24. The figures showing the amount of royalties paid by Bausch & Lomb to Zeiss of Jena since May 1, 1921, as alleged in paragraph 17 (g) of the indictment, and the names of the officers, agents, or representatives to whom, on behalf of Zeiss, Jena, each payment of said royalty was paid, are presently in the possession of Bausch & Lomb and the Government reserves the right to introduce such figures and names at the time of the trial.

25 and 30. Carl Zeiss, Inc., subsequent to on or about December 11, 1925, has refused to sell military optical instruments for use in the United States, as alleged in para-
612 graph 17 (h) of the indictment in the following instances: (Such instances are presently known to the Government through sources other than Carl Zeiss, Inc., although documents embodying this material were called for by a subpoena duces tecum served upon Carl Zeiss, Inc. There may be other instances based on other records of Carl Zeiss, Inc., which it has similarly failed to produce in response to a subpoena duces tecum, and the Government reserves the right to prove such other instances.)

	When	*Where*	*Instruments*	*Prospective Buyer*	*Substance of Refusal*
iv	In or about April 13, 1938	New York City	Panoramic Telescopic Gun Sights	National Forge & Ordnance Company	See Exhibit W and W[1] attached
ii	In or about March 1939	New York City	Collimator Tubes	American Armament Corp.	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.
iii	In or about February 1940	New York City	Anti-Aircraft Height Finders	American Ordnance Corporation	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.
iv	In or about July 1940	New York City	Anti-Aircraft Telescopic Sights	American Ordnance Corporation	Oral refusal; name of Zeiss, Inc., representative known to Zeiss, Inc.

Zeiss Bill of Particulars.

26. Bausch & Lomb refused to sell military optical instruments to prospective purchasers if such instruments were
616 eventually to go out of the United States of America as alleged in paragraph 19 (a) of the indictment in the following instances: (Such instances are presently known to the Government based on documents of Bausch & Lomb produced before a grand jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, and the Government reserves the right to prove such other instances.)

Items (i) to (iv)—See B & L, B/P p. 141.

617 27. Bausch & Lomb has refused to enter into arrangements whereby the information, knowledge, equipment, and machinery of Bausch & Lomb would be sold or employed in the manufacture of military optical instruments intended for use outside the United States as alleged in paragraph 19 (b) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances presently unknown to the Government and the Government reserves the right to prove such other instances.)

618 (a), (b), and (c). Bausch & Lomb refused to enter into such an arrangement with William E. Leigh, of New York City, acting on behalf of Standard Telephones and Cables, Ltd., of London. Refusal was in writing by letter dated July 1, 1938 addressed to Mr. Leigh in New York City and a copy of this letter is annexed hereto as Exhibit T. This refusal took place after negotiations were had by Mr. Leigh

first with representatives of Bausch & Lomb in New York City, and later with representatives of Bausch & Lomb, including the defendant Bausch, in Rochester. 619

28. Zeiss has shipped and Bausch & Lomb has received military optical instruments through the Port of New York as alleged in paragraph 19 (c) of the indictment in the following instance: (Such instance is presently known to the Government based on documents of Bausch & Lomb produced before a Grand Jury pursuant to a subpoena duces tecum. There may be other instances based on other records of Bausch & Lomb, the records of Zeiss, and the records of Carl Zeiss, Inc., and the Government reserves the right to prove such instances from such other records.) 620

For statistics—See B & L, B/P p. 143.

29. (a) and (b). Zeiss has collected and received from Bausch & Lomb royalty payments as alleged in paragraphs 19 (d) of the indictment. The royalty payments were made by check or draft drawn by Bausch & Lomb on its own bank payable to and deposited with The Chase National Bank of the City of New York, 18 Pine Street, New York City, for the account of Zeiss, in the years 1938 and 1939, and for the account of Nederlandsche Instrumenten Compagnie (Nedinsco), a wholly owned subsidiary of Zeiss, in the year 1937, on the dates set forth below as royalty for the calendar year stated: 621

For statistics—See B & L, B/P p. 144.

Zeiss Bill of Particulars.

Dated: New York, February 7, 1941.

Samuel S. Isseks

622 SAMUEL S. ISSEKS,
Special Assistant to the Attorney General
Attorney for the United States of America

Office and Post Office Address,
Room 233, United States Court House,
Foley Square,
Borough of Manhattan,
New York, New York.

To: C. LANSING HAYS, Esq.,
623 Attorney for Defendant Carl Zeiss, Inc.,

Office and Post Office Address,
1 Wall Street,
Borough of Manhattan,
New York, New York.

624

Exhibits Annexed to Bill of Particulars.

Exhibit A—See page 145.
Exhibit B—See page 145.
Exhibit C—See page 151. 625
Exhibit D—See page 153.
Exhibit E—See page 156.
Exhibit F—See page 157.
Exhibit G—See page 162.
Exhibit G-1—See page 164.
Exhibit H—See page 165.
Exhibit H-1—See page 167.
Exhibit I—See page 168.
Exhibit J—See page 169.
Exhibit K—See page 171.
Exhibit L—See page 173. 626
Exhibit M—See page 175.
Exhibit N—See page 179.
Exhibit O—See page 180.
Exhibit P—See page 181.
Exhibit Q—See page 182.
Exhibit R—See page 183.
Exhibit S—See page 186.
Exhibit T—See page 187.
Exhibit U—See page 188.
Exhibit V—See page 193.

The above exhibits are attached to the Carl Zeiss Inc. bill of particulars, and are the same as the exhibits attached to the Bausch & Lomb bill of particulars and have the same exhibit letters. 627

EXHIBIT W ANNEXED TO ZEISS BILL OF PARTICULARS.

April 11, 1938

628 Mr. Carl Leiss
485—5th Avenue
New York, New York

Dear Sir:

We are contemplating the purchase of fifty (50) Panoramic Telescope Guns Sights for use on our standard 75 M/M Guns. It has been called to our attention that you might be able to furnish us one of your standard sights that would be suitable for use on these guns. We would, therefore be pleased to have you forward us any literature
629 that you might have on sights that your company manufactures.

Very truly yours,

NATIONAL FORGE & ORDINANCE COMPANY
Chief Engineer, Ordnance Department

HHSwartzfager/ej

630

EXHIBIT W1 ANNEXED TO ZEISS BILL OF PARTICULARS.

(Letterhead of Carl Zeiss, Inc.) 631

In reply refer to M/H

April 13th, 1938.

National Forge & Ordnance Co.,
Irvine Warren Co., Pa.

Att. of Mr. Harry H. Swatrzfager,
Ordnance Dep't.

Gentlemen:

We thank you for your letter of April 11th requesting information on Panoramic Telescope Gun Sights for standard 75 mm guns. We are sorry to inform you that we do not import military instruments into the United States and would suggest that you get in touch with the Bausch & Lomb Optical Co. of Rochester, N. Y. 632

We regret our inability to be of better service to you in this instance.

We take pleasure in forwarding to you under separate cover a booklet about our Precision Finemeasuring Tools which may be of interest to you.

Yours very truly, 633

CARL ZEISS, INC.
S. HAYES

Complaint.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

634

CIVIL ACTION NO. 9-404

UNITED STATES OF AMERICA, PLAINTIFF

v.

BAUSCH & LOMB OPTICAL COMPANY, M. HERBERT EISENHART, CARL L. BAUSCH, THEODORE B. DRESCHER, AND CARL ZEISS, DEFENDANTS

635

COMPLAINT

The United States of America, seeking equitable relief by Samuel S. Isseks, Special Assistant to the Attorney General, acting under the direction of the Attorney General, complains and alleges, on information and belief, as follows:

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are
636 instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 as amended, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," said act being commonly known as the "Sherman Antitrust Act" against the above-named defendants in order to prevent violations by them jointly and severally as hereinafter alleged of Section 1 of the Sherman Act, and under Section 74 of the Act of August 27, 1894,

entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for Other Purposes," as amended by the Act of February 12, 1913, entitled "An Act to Amend 637
Sections 73 and 76 of the Act of August 27, 1894," commonly known as the Wilson Tariff Act, against the above-named defendants in order to prevent violation by them jointly and severally as hereinafter alleged of Section 73 of the Wilson Tariff Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful combination and conspiracy in restraint of interstate and foreign trade and commerce, have been and are carried out and made effective in part within the Southern District of New York, and 638
many of the unlawful acts done in pursuance thereof have been performed by the defendants or some of them and their respective representatives within said District. The interstate and foreign trade and commerce involved, as hereinafter described, are carried on in part within said District.

DEFINITIONS

3. The term "military optical instruments" as used herein shall be deemed to include such instruments as periscopes, range finders, altimeters, boresights, bomb sights, torpedo directors, sights for guns, and other scientific optical in- 639
struments (except binoculars) used to direct and control the firing of modern instruments of warfare. These instruments are an essential and integral part of what is commonly called the "fire control mechanism" of battleships, cruisers, and submarines. They are likewise essential to the rapid and accurate firing of modern instruments of warfare.

THE DEFENDANTS

640 4. The Bausch & Lomb Optical Company is hereby made a defendant herein. The said defendant, Bausch & Lomb Optical Company (hereinafter referred to as Bausch & Lomb) is a corporation organized under and existing by virtue of the laws of the State of New York, and has its principal place of business in Rochester, New York. For many years, Bausch & Lomb has maintained and now maintains an office in the Borough of Manhattan, City of New York, within this Southern District of New York, and has transacted business and now transacts business within the said District. Bausch & Lomb has been for many years, and is now, engaged in the business of manufacturing, 641 among other things, military optical instruments at its plant in Rochester, New York, and distributing and selling the said military optical instruments in interstate and foreign commerce.

5. Carl Zeiss is hereby made a defendant herein. The said defendant, Carl Zeiss (hereinafter referred to as Zeiss) is a corporation or association existing under and by virtue of the laws of Germany, and has its principal place of business at Jena, Germany. For many years Zeiss has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its 642 plant in Jena, Germany, and distributing and selling these instruments in Germany and in other countries in the world. For a number of years Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about December 11, 1925, and existing by virtue of the

laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss. Since 1921, Zeiss has carried on 643
business in Holland and in other countries through the instrumentality and agency of N. V. Nederlandsche Instrumenten Compagnie (hereinafter referred to as Nedinsco), a corporation organized under and existing by virtue of the laws of Holland, which has its principal office at The Hague, Holland, and which is a wholly owned subsidiary of Zeiss, and is completely dominated and controlled by Zeiss Through the instrumentality and agency of Nedinsco, Zeiss has carried on the business of manufacturing military optical instruments at a plant in Holland, and distributing and selling the said instruments in various countries in 644
the world.

6. The following individuals are hereby made defendants herein, each being associated with Bausch & Lomb, and each having the official title or position therewith shown below. Said individual defendants, during a part of the period of time covered by this complaint, and during all of the three years next preceding the date of the filing of this complaint, have held, and at the present time hold the official title or positions indicated below, and have been actively engaged in the management, direction, and control of the affairs and policies of Bausch & Lomb in connection 645
with the interstate and foreign trade and commerce described in this indictment.

Name of individual defendants	Address	Official Title or Position
M. Herbert Eisenhart	Rochester, New York	President.
Carl L. Bausch	Rochester, New York	Vice President in Charge of Research and Engineering.
Theodore B. Drescher	Rochester, New York	Vice President in Charge of Operations.

7. Whenever it is hereinafter alleged in this complaint that the defendant Bausch & Lomb did do or perform any
646 act or thing, the said allegation shall be deemed to mean that each of the said individuals named herein as defendants and described as officers, agents, or employees of Bausch & Lomb did authorize, order, direct, and do such act or thing. Whenever it is hereinafter alleged in this complaint that the defendant Zeiss did do or perform any act or thing, the said allegation shall be deemed to mean that the said act or thing was done by Zeiss, either in its own name or through the instrumentality and agency of Nedinsco or Carl Zeiss, Inc.

647 NATURE OF THE INTERSTATE AND FOREIGN COMMERCE INVOLVED

8. Since 1921 Bausch & Lomb has manufactured, distributed, and sold a substantial part of all optical instruments manufactured and distributed in the United States. In the five years next preceding the date of the filing of this complaint, Bausch & Lomb has manufactured, distributed, and sold approximately 50% of all military optical instruments manufactured, distributed, and sold within the United States.

9. For many years, including the three years next preceding the date of the filing of this complaint, Zeiss and its
648 subsidiary Nedinsco have been among the largest manufacturers and sellers of various types of optical instruments, including military optical instruments, in the world. For many years, including the three years next preceding the date of the filing of this complaint, Zeiss and Nedinsco have manufactured and sold the greater part of all military optical instruments manufactured and sold in Europe.

10. For many years prior to 1921 Bausch & Lomb and Zeiss competed with each other in countries other than the United States in the sale of all types of optical instruments, including military optical instruments. Since 1921 Bausch & Lomb and Zeiss have not competed either in the United States or in other countries in the world in the sale and distribution of military optical instruments, although they have continued to compete in the sale and distribution of certain other types of optical instruments. Bausch & Lomb and Zeiss for many years have manufactured and distributed and now manufacture and distribute and sell in the aggregate the greater part of all military optical instruments manufactured and sold in the world. 649 650

11. Bausch & Lomb manufactures military optical instruments at its plant in Rochester, New York, for sale and shipment in interstate commerce principally to the United States Government and has, upon occasion, as hereinafter alleged, also sold military optical instruments to foreign governments, and to firms, shipyards and individuals located in the states of the United States other than the State of New York. The United States Government purchases such instruments for use on battleships, cruisers, and submarines and for use with aircraft and artillery. Upon the receipt of an order from the United States Government, the said instruments are manufactured in Rochester, New York, and are shipped and transported in interstate commerce to the United States shipyards, forts, and various military and naval units located in San Francisco, California; Boston, Massachusetts; Brooklyn, New York; Philadelphia, Pennsylvania; Washington, District of Columbia; and to various other states of the United States of America. 651

12. On a number of occasions between 1921 and the date of the filing of this complaint, military optical instruments
652 have been sold by Bausch & Lomb directly to Governments other than that of the United States of America. Bausch & Lomb manufactured the said instruments in Rochester, New York, and shipped such instruments to the foreign country through the Port of New York, and such shipments constituted shipments in interstate and foreign commerce.

13. On a number of occasions between 1921 and the date of the filing of this complaint, military optical instruments have been purchased from Bausch & Lomb by various firms,
653 shipyards, and individuals located in the United States of America. The instruments were used in the construction of battleships, cruisers, and submarines intended for delivery to a foreign country. Bausch & Lomb manufactured the said instruments in Rochester, New York, and shipped such instruments to the various firms, shipyards, and individuals located in the United States of America, and such shipments constituted shipments in interstate commerce. Such instruments were intended for ultimate use in foreign commerce and were transported in foreign commerce.

14. At all times since 1921, including the three years next preceding the date of the filing of this complaint,
654 Bausch & Lomb and Zeiss have been engaged in importing military optical instruments into the United States through the Port of New York in the said Southern District of New York. Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb through the Port of New York in the said Southern District of New York. Except for the said military optical instruments

so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instruments which have been manufactured outside the United States. 655

THE COMBINATION AND CONSPIRACY

15. Beginning on or about April 28, 1921, defendants Bausch & Lomb and Zeiss, and since the date they became officers or directors of defendant Bausch & Lomb, defendants Eisenhart, Bausch, and Drescher, and continuing at all times thereafter up to and including the date of the filing of this complaint, such defendants, and other persons well knowing all of the foregoing facts, have been engaged in a wrongful and unlawful combination and conspiracy, carried on in part within the Southern District of New York, in restraint of the aforesaid interstate and foreign commerce in military optical instruments in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and in violation of Section 73 of the Act of Congress of August 27, 1894, entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other Purposes," as amended, that is to say: 656

16. The defendants, Bausch & Lomb and Zeiss, from on or about April 28, 1921, to the date of the filing of this complaint, and the defendants, Eisenhart, Bausch, and Drescher, since the time they became officers or directors of the defendant, Bausch & Lomb, to the date of the filing of this complaint, and other persons have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and conspiracy to suppress and limit 657

competition between themselves by agreeing (a) to divide the world market for military optical instruments into cer-
658 tain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other; (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale of such military optical instruments; (d) that Zeiss would not permit any person, firm, or corporation which was engaged, or which wished to engage in
659 the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery, or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery, and equipment; and (e) that Bausch & Lomb would not permit any person, firm, or corporation which was engaged or which wished to engage outside the United States in the business of manufacturing and distributing military op-
660 tical instruments, to use any of the devices, information, instruments, machinery, or equipment of Bausch & Lomb on any terms in connection with such manufacture and distribution even though such persons, firms, or corporations were ready, willing, and able to compensate Bausch & Lomb for the use of such knowledge, information, devices, instruments, machinery, and equipment.

17. Said unlawful combination and conspiracy has been effectuated by divers means and methods, including among others, the following: 661

(a) On or about April 28, 1921, the corporate defendants entered into a written agreement in German for a period of twenty-one years, from May 1, 1921, to April 30, 1941. Paragraph 3 of such agreement, as translated by defendant Bausch & Lomb, provides as follows:

> B. & L. [Bausch & Lomb] obligate themselves not to sell, directly or indirectly, military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 662

In paragraph 9 of the said contract Bausch & Lomb and Zeiss agreed to conceal the existence of the contract from third persons, and (so far as practicable) not to disclose the contract even to their own employees. Said agreement of April 28, 1921, is annexed hereto and made a part hereof as exhibit A, with the same effect as if it were fully and in detail set forth herein. 663

(b) In consideration of the obligations assumed by Zeiss in paragraph 3 of the said agreement of April 28, 1921, and certain other obligations assumed by Zeiss in the said agreement, Bausch & Lomb agreed in paragraph 2 of the said agreement of April 28, 1921, to pay to Zeiss for a period of twenty-five years from May 1, 1921, a royalty equal

to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb, including each
664 piece of such equipment sold by Bausch & Lomb to the Government of the United States, the said royalty to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

(c) The April 28, 1921, agreement alleged in paragraph 18 (a) of this complaint, was supplemented on June 27, 1925, and again on October 28, 1925, to modify the provisions of paragraph 2 with respect to royalty payments and to modify paragraph 3 so as to specify the circumstances
665 under which Bausch & Lomb and Zeiss could make quotations on military optical instruments, the eventual destination of which was the territory of the other, it being agreed that such a quotation could be made only with the consent of the other party to the agreement, and that the price quoted should be agreed by Zeiss and Bausch & Lomb. Bausch & Lomb and Zeiss agreed that if either were requested to make bids by any government on military optical instruments intended for use in the territory allotted the other, the requested quotation would contain a markup over the bidder's regular price up to 20% of said regular price, which excess was intended to throw the business to the
666 party to whom the territory was allotted and, in case such bid were successful, the excess was to be paid by the successful bidder to the other contracting party. The supplementary agreements of June 27, 1925, and October 28, 1925, are annexed hereto and made a part hereof as exhibits B and C, respectively, with the same effect as if they were fully and in detail set forth herein.

(d) A new agreement, signed by Bausch & Lomb at Rochester, New York, on November 26, 1926, and by Zeiss at Jena, Germany, on December 24, 1926, was entered into 667
by Bausch & Lomb and Zeiss. The said new agreement was identical with the agreement of April 28, 1921, as supplemented, except that paragraph 9 calling for secrecy was omitted from the new written agreement, paragraph 2 was modified as to the royalty payments, and paragraph 3 was changed so as not to indicate on its face that the parties to the contract had divided the world market between themselves and that each had agreed not to compete in the territory allotted to the other. Before the making of the said new agreement, Bausch & Lomb knew that paragraph 3 of the contract of April 28, 1921, as supplemented, vio- 668
lated the Antitrust laws of the United States, and the said new agreement was made to conceal the existence of the agreement to divide the world market and not to compete in interstate and foreign commerce. Notwithstanding this change in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925. The said agreement of November 26-December 24, 1926, is annexed hereto and made a part hereof as exhibit D with the same effect as if it were fully and in detail set forth herein.

669

(e) At all times after May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb has refused to sell or to quote prices on military optical instruments for use outside of the United States, unless Zeiss has consented to such a sale. On a number of occasions since June 27, 1925, Bausch & Lomb has sold military optical instruments for use outside of the

United States only after first obtaining the consent of Zeiss as to the sale and the price and in the case of each such sale
670 the sale was made at an arbitrary, artificial, unreasonable, and non-competitive price agreed upon by Zeiss and Bausch & Lomb. On other occasions subsequent to May 1921, Bausch & Lomb has offered to sell military optical instruments for use outside of the United States, with the consent of Zeiss, at arbitrary, artificial, unreasonable, and non-competitive prices agreed upon by Zeiss and Bausch & Lomb. At all times subsequent to May 1921 to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb has refused to permit persons, firms, and corporations who were engaged or who
671 wished to engage in the production and distribution of military optical equipment outside of the United States, to use any of the devices, information, machinery, or equipment of Bausch & Lomb for such production and distribution, even though such persons, firms or corporations were ready, willing, and able to compensate Bausch & Lomb for such use.

(f) At all times subsequent to May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Zeiss has refused to sell military optical instruments for use within the United States unless the
672 sales were consented to by Bausch & Lomb. On various occasions subsequent to June 27, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable, and noncompetitive prices agreed upon by Bausch & Lomb and Zeiss. At all times subsequent to May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Zeiss has

refused to permit any person, firm or corporation engaged in, or who wished to engage in, the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments, and equipment of Zeiss for the production of military optical instruments even though such persons, firms, and corporations were ready, willing, and able to compensate Zeiss for such use. 673

(g) Since May 1, 1921, to and including the three years next preceding the date of the filing of this complaint, Bausch & Lomb, pursuant to and in execution of the combination and conspiracy described in this indictment, has paid to Zeiss (pursuant to the provisions of paragraph 2 of the said agreement of April 28, 1921, as supplemented and modified, as described in paragraph 17 (a) (b), and (c) of this complaint), as a royalty, a percentage on the gross sales price of each piece of military optical equipment sold by Bausch & Lomb to the Government of the United States, and each such payment has been made irrespective of whether the piece of military optical equipment with respect to which the payment was made, has been covered in whole or in part by patents owned by Zeiss. 674

EFFECTS OF THE COMBINATION AND CONSPIRACY

18. By carrying out the combination and conspiracy hereinbefore described, the defendants have directly, substantially, and unreasonably restrained interstate and foreign commerce in military optical instruments; have exacted arbitrary, artificial, unreasonable, and noncompetitive prices from purchasers of military optical instruments, including the Government of the United States, and have 675

prevented and restrained free and vigorous competition in the production and distribution of military optical instruments in the United States and in interstate and foreign
676 commerce. The defendants intend to carry out the combination and conspiracy hereinbefore described and will continue to do so unless enjoined by this Court.

PRAYER

Wherefore, plaintiff prays:

(1) That writs of subpoena issue, directed to each defendant, commanding said defendant to appear herein and answer under oath the allegations contained in this com-
677 plaint and to abide by and perform such acts and decrees as the Court may make in the premises;

(2) That the Court adjudge and decree that the defendants have contracted, combined, and conspired to restrain trade in violation of Section 1 of the Sherman Antitrust Act and Section 73 of the Wilson Tariff Act.

(3) That the aforesaid conspiracy in restraint of trade be adjudged and decreed to be unlawful, and that all of the agreements, understandings, and practices alleged in this complaint be adjudged and decreed to be unlawful and in
678 violation of the Sherman Antitrust Act and the Wilson Tariff Act.

(4) That the agreements of April 28, 1921; June 27, 1925; October 28, 1925; and November 26-December 24, 1926, be adjudged and decreed to be unlawful and that the observance of each of these agreements in any respect and the execution of such agreements be perpetually enjoined.

(5) That the defendants and each of them and their officers, directors, agents, representatives, employees, and all persons and corporations acting and claiming to act on behalf of them be perpetually enjoined from agreeing, combining, or conspiring to restrain trade and from engaging in or participating in any practices, contracts, relationships, or understandings, or claiming any rights thereunder having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Wilson Tariff Act. 679

(6) That the plaintiff have such other further, general, and different relief as the nature of the case may require and the Court may deem proper. 680

SAMUEL S. ISSEKS,
Special Assistant to the Attorney General.

STANLEY E. DISNEY,
MONROE KARASIK,
IRVING B. GLICKFELD,
MARCUS A. HOLLABAUGH,
JOHN E. MCCRACKEN,
Special Attorneys,
Attorneys for the United States of America.

THURMAN ARNOLD, 681
Assistant Attorney General.

EXHIBIT A

Agreement of April 28, 1921

Paragraph 1

682 The firm of Carl Zeiss agrees to assist the firm of Bausch & Lomb in the sphere of Military instruments (Army and Navy) in the manner that:

a. It places at the disposition of the firm of Bausch & Lomb all of the drawings and other supporting data necessary for the manufacture in America;

b. It participates in the scientific and constructive improvement of existing instruments as well as in the development of new designs and problems with the same
683 amount of interest as it would bestow on its own tasks;

c. It places at the disposition of the firm of Bausch & Lomb, manufacturing rights for the United States of America for all existing inventions and industrial protected rights (note of translator: "patent rights") and those that out of the joint labor may still be created (in this connection new patents in the United States in the Military line shall not be acquired in the name of the firm of Carl Zeiss, but for its account in the name of the firm of Bausch & Lomb);

d. It assists in the engagement of the proper scientific
684 and technical personnel and if desired will temporarily send some of its higher officials to America (traveling expenses for account of Bausch & Lomb).

Paragraph 2

In return the firm of Bausch & Lomb agrees to pay to Carl Zeiss a royalty on its total gross earnings in the Mili-

tary line within and without the U. S. A. In this is comprised every shipment to Army and Navy authorities, as well as every sale of Military instruments to dealers and individual Military personages. 685

Exempt are field glasses, unless these form parts of other Military instruments or become Military instruments by the addition of special devices.

The royalty is calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first seven years it amounts to 7%, in the consecutive seven years to 6%, and then it is reduced consecutively each year by ½% to ½% in the twenty-fifth year. The reduction below 6% does not take place in the case of instruments that are patented (paragraph 1c) 686 during the existence of the patent, unless, that the latter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction.

PARAGRAPH 3

B. & L. obligate themselves not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution. 687

PARAGRAPH 4

In furtherance of the aims of this agreement B. & L. in Rochester will create a new Department solely responsible

to the Board of Directors, which is charged with the independent development of all scientific and technical tasks
688 within the Military scope and the maintenance of connections with Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department.

PARAGRAPH 5

Workmen and employees of one party cannot even within one year after leaving the services, be employed by the other party, unless with the consent of the first party.

PARAGRAPH 6

689

Within the sphere of nonmilitary articles both parties are in free competition in the World's markets (inclusive of North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another relative to their common interests, as may develop from the close cooperation in the Military line and they make the reservation of coming to special agreements regarding respective territories and nonmilitary articles. In particular they will place new projects at the disposition of each other under royalty agreements.

690 PARAGRAPH 7

Both parties shall, in the Military line of instruments and in all other lines of endeavor, where they cooperate technically within the provisions of this agreement, exchange their manufacturing experience and give access to the workshops to confidential representatives of the other party. They shall take care, in this connection, that the advantages gained

from the cooperation shall not be shared by third parties, not concerned. Therefore, each party shall place at the disposition of the other, inventions in the Military line, acquired from a third party under the same favorable conditions under which it, itself, is making use of them. 691

If Bausch & Lomb should acquire patent rights not resulting from the Zeiss cooperation (paragraph 1c) but independent, therefrom, from employees of Bausch & Lomb, these patents also shall be at the disposition of Carl Zeiss or of such enterprises in which Carl Zeiss is interested with at least one-third of the capital stock, for the territory outside of the United States against the payment of a royalty of 4%, during the existence of the patent.

692

PARAGRAPH 8

The mutual obligation regarding the exchange of Military designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

PARAGRAPH 9

The contracting parties agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances. 693

PARAGRAPH 10

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Provision in letter of Apr. 28th.)

Exhibit A.

PARAGRAPH 11

This agreement enters into force with the first of May
694 1921 and continues until April 30, 1941, providing, however, for the continuance of the royalty payment according to paragraph 2.

PARAGRAPH 12

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for that time and upon an appeal the board of arbitrators shall make such dispositions as seem necessary
695 in order to carry out the will of the parties to this agreement under the changed conditions, as far as possible.

PARAGRAPH 13

In the case of differences of opinion, regarding the interpretation or execution of this agreement, between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator, each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as President. Only such persons are eligible to function as arbitrators who from the beginning of the dispute have not been
696 personally interested and are in no way employed by either party.

BAUSCH & LOMB OPTICAL CO.,

(signed) per GEO. N. SAEGMULLER, *Vice Pres.*
CARL ZEISS.

(signed) PPA DR. ING. BAUERSFELD.

(signed) KOTTHAUS.

Jena, April 28, 1921.

EXHIBIT B

Supplemental Agreement of June 27, 1925

In paragraph 2, the third paragraph receives the following wording: 697

> The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6%, and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existence of the patent, unless that the letter patent has reference to secondary parts only, in which case the parties shall come to an agreement as to a proper reduction. 698

Paragraph 3 receives the following wording:

> The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity 699

Exhibit B.

of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries
700 as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The Firm of Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States,
701 the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give an-
702 other firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

BAUSCH & LOMB OPTICAL CO.,
(Signed) CARL F. LOMB, *Vice Pres.*

Rochester.

CARL ZEISS,
(Signed) P. PA. KOTTHAUS.

Jena, June 27, 1925.

EXHIBIT C

Supplemental Agreement of October 28, 1925

In paragraph 2, the third paragraph receives the following wording: 703

> The premium will be calculated from the net invoice amount for the instruments furnished during the existence of this agreement. During the first ten years it amounts to 7%, in the consecutive seven years to 6% and then consecutively it is reduced each year by ½% to 2% in the twenty-fifth year. The reduction in the rate of premium below 6% does not take place in the case of instruments that are patented (paragraph 1c) during the existence of the patent, unless that the letter patent has reference to secondary parts only, in 704 which case the parties shall come to an agreement as to a proper reduction.

Paragraph 3 receives the following wording:

> The Firm of Bausch & Lomb obligates itself not to sell, directly or indirectly, Military instruments to countries outside of the United States of America, and vice versa Carl Zeiss obligates itself not to sell such instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United 705 States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party that has made the

protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. The firm of
706 Bausch & Lomb besides, has to pay to the firm of Zeiss the royalty on the normal price according to paragraph 2, in case Bausch & Lomb is awarded the order.

In case the inquiries referred to in paragraph 2 and 3 should not come to Bausch & Lomb from a Government, but exceptionally from a commercial house of a country outside of the United States, the firm of Bausch & Lomb is to communicate immediately with the firm of Nedinsco, and, depending on the situation at Nedinsco, either to make the protective offer named
707 to her by the latter firm, or to decline the inquiry under pretense. The information in question will be given to the Firm of Bausch & Lomb by the firm of Nedinsco.

In the case of inquiries from American shipyards for delivery of optical instruments for the equipment of a ship of a country outside of the United States, the firm of Bausch & Lomb will immediately communicate with Carl Zeiss. The business will then be done in common between both firms in the manner that Bausch & Lomb will furnish those instruments, which they have manufactured heretofore, and Nedinsco through the firm of Bausch & Lomb, the other optical instruments in
708 question, which transaction shall exclude the payment of royalty by Bausch & Lomb to Carl Zeiss and include a commission of not less than net 5% for Bausch & Lomb. A protective offer the same as has been agreed in the above in the case of quotations to authorities does not apply in order not to give another firm the chance of securing the order, in consequence of the high prices of Bausch & Lomb.

Under the provision of paragraph 3, for the pro-

tective offer, only the normal price fixed by the firm of Carl Zeiss is subject to royalty payment, whereas the increase above the normal, to be turned over to the latter firm, is not subject to royalty. 709

In case that the firm of Bausch & Lomb cannot meet the normal price fixed by the firm of Carl Zeiss, but shall be forced in consequence of the higher cost of production to demand more, this increase, besides the normal price is subject to royalty, whereas the increase to be paid to the firm of Carl Zeiss on the normal price is not considered subject to royalty.

If a commission to an agent is to be paid, which as far as possible should be denied, but which nevertheless in certain cases cannot be avoided, this commission, calculated into the selling price is also subject to royalty payment. 710.

If the firm of Bausch & Lomb is furnishing to American shipyards, optical instruments as equipment for a ship of a country outside of the United States, all instruments in which the ideas of construction of the firm of Carl Zeiss have been used, shall, besides the trade name of Bausch & Lomb, be engraved with the designation, "System Nedinsco-Zeiss." Instruments according to the construction of Bausch & Lomb shall bear only their name. On instruments furnished by Nedinsco the name of Nedinsco will appear next to the name of Bausch & Lomb. 711

BAUSCH & LOMB OPTICAL CO.,
(Signed) CARL F. LOMB, *Vice Pres.*

ROCHESTER, *Dec. 11, 1925.*

PPA CARL ZEISS,
(Signed) FROSTMANN.

JENA, *October 28, 1925.*

EXHIBIT D.

Agreement of November 26—December 24, 1926

PARAGRAPH 1

712

The firm of Carl Zeiss agrees to assist the Bausch & Lomb Optical Company in the production and sale of Military instruments as follows:

(a) It will place at the disposal of the Bausch & Lomb Optical Company all of the drawings and other supporting data necessary for the manufacture in America.

(b) It will participate in the scientific and structural improvement of existing instruments as well as in the de-
713 velopment of new designs and the solution of new problems with the same amount of interest that it would bestow on its own work.

(c) It will place at the disposal of the Bausch & Lomb Optical Company, manufacturing rights (patent rights) in the United States of America for all existing inventions and protected processes as well as those inventions and processes that may in the future be created by the joint efforts of the firm of Carl Zeiss and the Bausch & Lomb Optical Company. New patents in the United States in the Military line will not be acquired in the name of Carl Zeiss but at
714 its expense in the name of the Bausch & Lomb Optical Company.

(d) It will assist the Bausch & Lomb Optical Company in the employment of proper scientific and technical personnel and, if desired, will send temporarily some of its high officials to America, traveling expenses to be paid by the Bausch & Lomb Optical Company.

Exhibit D.

PARAGRAPH 2

In return, the Bausch & Lomb Optical Company agrees to pay to the firm of Carl Zeiss a royalty on its total sales in the Military line within and outside the United States of America. In this total, all sales of Military instruments to the Army and Navy authorities, to dealers, and individuals are to be included. 715

Field glasses are exempt unless they form parts of other Military instruments or become Military instruments by the addition of special devices.

For the first ten years, this royalty, which will be calculated from the net invoice amounts of the instruments furnished during the existence of this agreement, will be 7%, for the next seven years 6%, and it will thereafter be reduced by ½% each year to 2% in the 25th year. There will be no reduction in the rate of royalty below 6% in the case of patented instruments during the existence of the patent unless the patent relates to parts of secondary importance only, in which case the parties shall come to an agreement as to the proper reduction (see Paragraph 1, article c). 716

PARAGRAPH 3

The license hereby granted is exclusive, the firm of Carl Zeiss agrees that it will grant no license to another American manufacturer. 717

PARAGRAPH 4

In furtherance of the aims of this agreement, the Bausch & Lomb Optical Company in Rochester will create a new Department responsible solely to the Board of Directors, which is charged with the independent development of all

scientific and technical tasks within the Military scope and the maintenance of associations with the firm of Carl Zeiss
718 in Jena. The parties will come to an agreement as regards the heads to be placed in charge of this department.

PARAGRAPH 5

Neither party will, without the consent of the other, employ persons who have left the service of the other within one year.

PARAGRAPH 6

In the production and sale of nonmilitary articles, both parties will remain in unrestricted competition in the
719 World's markets (including North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special agreements may be made regarding territories on nonmilitary articles. New projects may be placed at each other's disposal under royalty agreements.

PARAGRAPH 7

Both parties shall, in the Military line and in all other lines, where they cooperate technically within the provisions
720 of this agreement, exchange their manufacturing experience and give access to their respective manufactories to each other's confidential representatives. In this, however, they shall use every precaution that the advantages thus gained shall not be shared by disinterested third parties. Inventions in the Military line which may be acquired by either party from a third party shall be placed at the disposal of the other under the same conditions under which they

are acquired. If the Bausch & Lomb Optical Company should acquire patent rights not resulting from the Zeiss cooperation but independent therefrom, from its own em- 721
ployees, these patents shall also be placed at the disposal of Carl Zeiss or of such enterprises in which Carl Zeiss is interested to the extent of owning at least ⅓ of the capital stock, for the markets outside of the United States, Zeiss or its affiliated company to pay the Bausch & Lomb Optical Company a royalty of 4% during the life of the patent.

PARAGRAPH 8

The mutual obligation regarding the exchange of Mili- 722
tary designs shall be void whenever the highest home Government of one party expressly demands that they be kept in confidence in the interest of the nation.

PARAGRAPH 9

The parties recognize as concluded all previous agreements existing between them and that any claims on one another arising therefrom do not further exist. (Proviso in letter of Apr. 28th, 1921.)

PARAGRAPH 10

This agreement is effective as of May 1st, 1921, and con- 723
tinues in force until April 1st, 1941, with the reservation of the prolongation of the license (paragraph 2).

PARAGRAPH 11

If, by reason of unforeseen political events, the execution of this contract shall be made impossible, temporarily or

permanently, or the firm of Carl Zeiss limited in the enjoyment of its full license claims, this agreement shall be suspended for such time as is necessary and upon an appeal,
724 a board of arbitrators as subsequently designated, shall make such dispositions as may seem necessary to carry out as far as possible, the will of the parties to this agreement, under the changed conditions.

PARAGRAPH 12

In the case of differences of opinion, regarding the interpretation or execution of this agreement between the parties, these differences are to be settled by arbitration. If the parties in such cases cannot agree on a common arbitrator,
725 each party is to appoint its own arbitrator and these two arbitrators in turn will name a third as Chairman. The decision of the arbitrators on any question submitted to them shall be final and conclusive between the parties. Only such persons are eligible to function as arbitrators, who are not personally interested in the outcome of the dispute and not employed in any way by either party.

BAUSCH & LOMB OPTICAL COMPANY,
CARL F. LOMB, *Vice President.*

ROCHESTER, N. Y., *November 26, 1926.*

726

CARL ZEISS.

JENA, *December 24, 1926.*

Final Decree.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK 727

Civil Action No. 9-404

UNITED STATES OF AMERICA, PLAINTIFF

v.

BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER, DEFENDANTS

FINAL DECREE 728

I. The United States of America filed its petition herein on July 8th, 1940; each of the defendants appeared and asserted their innocence of any violation of law; no testimony having been taken, each of the defendants consented to the entry of this decree without any findings of fact, upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States; and the United States of America, by its counsel, having consented to the entry of this decree and to each and every provision thereof, and having moved the Court for this injunction,

729

Therefore, it is ORDERED, ADJUDGED, AND DECREED as follows:

II. That the Court has jurisdiction of all persons and parties hereto; and for the purposes of this decree and proceedings for the enforcement thereof, and for no other

purpose, that the Court has jurisdiction of the subject matter hereof and the petition states a cause of action against the defendants under the Act of July 2, 1890, entitled
730 "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," and under Section 73 of the Act of August 27, 1894, entitled "An Act to Reduce Taxation, to Provide Revenue for the Government, and for other purposes," as amended by the Act of February 12, 1913, entitled "An Act to Amend Sections 73 and 76 of the Act of August 27, 1894," commonly known as the Wilson Tariff Act.

III. Whenever the term "military optical instruments" is used hereinafter, it shall be understood to mean such
731 instruments as periscopes, range finders, altimeters, boresights, bomb-sights, torpedo directors, sights for guns, and other similar scientific optical instruments used to direct and control the firing of modern instruments of warfare.

IV. The individual defendants and the defendant Bausch & Lomb Optical Company, its successors, officers, directors, managers, employees, and agents, and each of them, be and they hereby are perpetually enjoined and restrained from agreeing, combining, or conspiring with any other manufacturer of military optical instruments:

732 1. To divide or allot among themselves the world market for military optical instruments, and to refrain from competing among themselves in the sale and distribution of such instruments in any portion of such market;

2. To refrain, whether with or without the prior consent of any other manufacturer, from selling, offer-

ing for sale or making price quotations on, military optical instruments for use in the area or territory allotted to such other manufacturer of such instruments; 733

3. To fix or maintain prices, quotations or terms of sale of military optical instruments;

4. To refuse to permit any person, firm or corporation engaged, or which wishes to engage, in the business of manufacturing and distributing military optical instruments, to use any of the devices, information, instruments, machinery or equipment of the defendant Bausch & Lomb Optical Company in connection with such manufacture and distribution if such persons, firms or corporations are ready, willing and able to compensate said Bausch & Lomb Optical Company adequately for the use of such devices, information, instruments, machinery or equipment; 734

5. To agree upon the prices which any other manufacturer of military optical instruments shall charge for such instruments;

6. To make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments; 735

7. To make offers for sale, price quotations or sales of military optical instruments conditional upon the consent of any other manufacturer of such instruments.

Nothing contained herein shall apply to the lawful conduct of the individual business of the defendant Bausch &

Lomb Optical Company, its affiliates or subsidiaries (including, without limiting the foregoing, its unrestricted
736 right to select its customers and to decline any business), or to the activities of the defendants other than in connection with military optical instruments.

V. The following agreements between defendant Bausch & Lomb Optical Company and the firm of Carl Zeiss of Jena, Germany (hereinafter referred to as "Carl Zeiss'), are hereby declared unlawful and the defendant Bausch & Lomb Optical Company is hereby enjoined from carrying out any of their provisions: Agreement dated April 28, 1921; Supplementary Agreement to the Agreement of April
737 28, 1921, dated June 27, 1925; Supplementary Agreement to the Agreement of April 28, 1921, dated October 28, 1925. The Agreement between Bausch & Lomb Optical Company and Carl Zeiss, dated at Rochester, November 26, 1926, and at Jena, December 24, 1926, is hereby declared unlawful, and the further execution and performance of the same having heretofore become impossible and the said agreement having heretofore been suspended, the defendant Bausch & Lomb Optical Company is enjoined from carrying out any of its provisions, including the payment of any royalties thereunder until the further order of this Court; provided, however, that nothing herein contained shall be construed to affect the rights of Bausch & Lomb Optical Company under
738 any patents for the manufacture of military optical instruments.

VI. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or an Assistant Attorney

General, and on reasonable notice to the defendants as to time and subject matter, made to the principal office of the defendants, be permitted (1) reasonable access, during the office hours of the corporate defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the defendants, relating to any of the matters contained in this decree, (2) subject to the reasonable convenience of the defendants and without restraint or interference from them, and subject to any legally recognized privilege, to interview officers or employees of the corporate defendant, who may have counsel present, regarding any such matters; and the corporate defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party, or as otherwise required by law.

739

740

VII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof (including, but without being limited to, any modification in order to conform this decree to any Act of Congress enacted or repealed after the entry of this decree), for the enforcement of compliance therewith, and for the punishment of violations thereof. Whenever obligations

741

are imposed upon the defendants by the laws or regulations of any State with which the defendants by law must comply in order to do business within such State, the Court,
742 upon application of the defendants or any of them, shall from time to time enter orders relieving the defendants from compliance with any requirement of this decree in conflict with such laws or regulations, and the right of the defendants to make such applications and to obtain such relief is expressly granted.

Any application by any party hereto under the provisions of this paragraph, shall be made in open court upon notice to all of the parties hereto, and any of the parties hereto, upon such application, shall have the right and privi-
743 lege of requiring the production of witnesses upon whose testimony such application is sought or opposed, and of examining and cross-examining such witnesses in accordance with the rules of the Court.

VIII. This decree shall go into effect immediately.

Dated, July 9, 1940.

WM. BONDY,
United States District Judge.

We hereby consent to the entry of the foregoing decree:

For the Plaintiff:

THURMAN ARNOLD,
744 *Assistant Attorney General.*

SAMUEL S. ISSEKS,
Special Assistant to
the Attorney General.

For the Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher:

SIMPSON THACHER & BARTLETT.

Reply Affidavit of Whitney North Seymour.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

File No. Civ. 17-11 745

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,
Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER, 746
Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WHITNEY NORTH SEYMOUR, being duly sworn, deposes and says:

I am an attorney and counsellor at law and a member of the firm of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher in this action. 747 This affidavit is submitted pursuant to leave granted in open court on January 16, 1942, in reply to the affidavit of Emanuel Thebner, verified January 15, 1942, and the affidavit of Murray Brensilber, verified January 15, 1942, which merely adopts and reiterates the said affidavit of Emanuel Thebner. Both affidavits were submitted in opposition to the motion of these defendants brought on by order

to show cause dated January 14, 1942, on the return day of this motion.

748 The said affidavit of Emanuel Thebner consists in large measure of legal arguments on the questions presented to this Court by this motion and from the records in the anti-trust proceedings brought by the Government and now on file in this Court and of erroneous conclusions thereon. My failure to deal with some of the egregious errors in said affidavit is not to be regarded as acquiescence therein. Nothing in that affidavit presents any valid reason why the relief sought by these defendants by the orders to show cause herein, dated January 6 and January 14, 1942, should not be granted; nothing in that affidavit satisfactorily

749 justifies the allegations made by these plaintiffs in their complaint herein, which are inconsistent with, or contradictory of, facts appearing in the pleadings in the anti-trust proceedings; nothing contradicts any of the categorical denials and statements of fact contained in the affidavits annexed to said orders to show cause and submitted in support of these motions. The opposing affidavits do not purport to be in opposition to the motions brought on by order to show cause dated January 6, 1942, and addressed to the complaint herein; they were not properly served as affidavits upon those motions, and they cannot be considered thereon. Examination of the records of the Government's anti-trust proceedings on file in this Court fully

750 demonstrates the falsity of the charges in the complaint heretofore more fully pointed out in the affidavit of M. Herbert Eisenhart; selected quotations of incomplete portions of such records and recourse to inapplicable rules of law do not obscure that fact.

The plaintiffs now admit that the charges expressly made in the complaint that the individual defendants are officers

of Carl Zeiss, Inc., as well as of Bausch & Lomb, was "an inadvertent error."

There is no satisfactory explanation of the admittedly false charge in the complaint that the agreements in question were *in fact* made between Bausch & Lomb and Carl Zeiss, Inc., one of such agreements being alleged to have been made even before the incorporation of the defendant Carl Zeiss, Inc. 751

Finally, the charge in paragraphs "Eighth" and "Ninth" of the complaint, to the effect that the agreements referred to required Bausch & Lomb to add 20% to all bids which it made to the United States Government on military optical instruments, is nowhere found in or supported by the records in the anti-trust proceedings referred to, and, indeed, is withdrawn in the purported amended complaint served by the plaintiffs herein. The reference in Mr. Thebner's affidavit to paragraph "Eleventh" of the purported amended complaint and the reliance on paragraph "17(b)" of the indictment in the anti-trust proceedings furnishes no support whatever for the false charge now sought to be withdrawn. 752

Since the complete records of the Government's anti-trust proceedings are contained in the files of this Court and have been brought before this Court not only by the moving defendants but also by the affidavit of Mr. Thebner, no further reference to or discussion of them is necessary here. Comparison of the statements contained in those records with those contained in plaintiffs' complaint herein demonstrates the falsity of the charges in the complaint in the particulars mentioned. 753

The affidavit of M. Herbert Eisenhart, submitted in support of this motion as well as in support of the motion brought on by order to show cause dated January 6, 1942, establishes not only that the material allegations of the

complaint are shown to be false by reference to the records in this Court but also that the charges are false in fact; that there was no requirement that Bausch & Lomb should
754 inflate its bids on military optical instruments to be supplied to the United States Government by 20% or any other amount, and that there was no such inflation of bids. The categorical denials of inflation of bids and of the submission of any excessive, false, fictitious or fraudulent claims of any kind to the United States Government by Bausch & Lomb or of fraud of any kind in transactions between Bausch & Lomb and the United States Government, reiterated and corroborated by the affidavits of the other individual defendants, are not even alluded to, much less
755 contradicted, in the affidavits of the plaintiffs. Comparison of the affidavit of Mr. Eisenhart shows no inconsistency with allegations in the anti-trust proceedings. Plaintiffs' assertion that issues of fact are raised on this motion is without substance.

The remaining statements in the affidavit of Mr. Thebner can be disposed of in an equally summary way. No extension of time to answer the complaint or the purported amended complaint was sought from plaintiffs by me or by anyone connected with my firm on behalf of these defendants; the only extension of time secured was that contained in the order to show cause dated January 6, 1942. The motion for summary judgment brought on by the said
756 order to show cause constituted a "responsive pleading" to the complaint herein and, upon the making of the motion, plaintiffs lost their right to amend their complaint as of course.

No question of the timeliness of defendants' motions is involved. The motion papers on the first motion, returnable January 16, 1942, were served upon the plaintiffs on January 6, 1942, ten days in advance of the time specified for

the hearing of the motion in accordance with the provisions of Rule 56(c), and, in any event, the provisions of the order to show cause dated January 6, 1942, pursuant to Rule 6, properly advanced the time for service of the motion papers to January 7th. The unsuccessful attempt of these plaintiffs to avoid hearing and decision on this motion by service of a purported amended complaint on January 13, 1942, made it necessary for these defendants to secure the order to show cause dated January 14, 1942, for relief with respect to the said purported amended complaint as set forth therein. Said order to show cause dated January 14, 1942, properly reduced the time for service of the motion papers upon the plaintiffs, pursuant to Rule 6, and no contention can be made that the said order to show cause and the papers upon which it was granted were not served in accordance with the said order. 757 758

The statement in the affidavit of Mr. Thebner that "plaintiffs are entitled under the Rules of Civil Procedure, Sections 26, 31 and 37, to apply for examination before trial, discovery and inspection and pre-trial relief even before answer" requires no answer. No such application has been made by these plaintiffs.

The stay in the order to show cause of January 14, 1942, was not prejudicial to them in any respect. It was made advisable by their attempt to circumvent defendants' motion returnable January 16, 1942. If plaintiffs desired to attack it, they were free to make application to do so. In any event, it cannot affect defendants' right to the relief sought by this motion. Plaintiffs' opposition on the return day and the filing of affidavits in opposition to this motion is sufficient answer to the contention that the stay was in any way prejudicial. 759

(Sworn to by Whitney North Seymour, January 21, 1942.)

Order Denying Leave to Amend, Etc.

At a Stated Term of the United States District Court, Southern District of New York, for the
760 hearing of motions, held in the United States Court House, in the Borough of Manhattan, City, County and State of New York, on the 24th day of January, 1942.

Present:

HON. ALFRED C. COXE,
United States District Judge.

[SAME TITLE]

761

Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher having moved, by order to show cause, dated January 14, 1942, for an order herein

1. Striking as sham and false the complaint herein pursuant to the provisions of Rule 11 of the Federal Rules of Civil Procedure and directing the institution of appropriate disciplinary action against the plaintiffs herein for wilful violation of said Rule;

762 2. (a) determining that the proposed amended complaint of the plaintiffs herein served upon the attorneys for the defendants on January 13, 1942, is a nullity;

(b) denying leave to the plaintiffs herein to amend their complaint in accordance with said proposed amended complaint;

or in the event that said motion designated 2(a) and (b) be denied, and the complaint is amended in accordance with said proposed amended complaint,

763

3. (a) dismissing this action and the amended complaint herein as against the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York;

(b) dismissing this action and the amended complaint herein as against the defendants on the ground that the amended complaint fails to state a claim upon which relief can be granted;

764

(c) granting summary judgment to these defendants on the ground that there is no genuine issue as to any material fact herein;

and the defendant Carl Zeiss, Inc. having moved, by order to show cause, dated January 14, 1942, for an order herein

Granting to the defendant, Carl Zeiss, Inc., the relief prayed for in the said notice of motion herein, dated January 6, 1942, and as an additional ground for relief in connection with said motion,

765

(a) Striking out as sham and false the proposed amended complaint and directing the institution of appropriate disciplinary proceedings of the plaintiffs herein for wilful violation of the Rules of Civil Procedure of this Court, and

(b) Directing the proposed amended complaint of the plaintiffs herein, of which a copy was delivered to the attorneys for the defendant, Carl Zeiss, Inc., on
766 January 13, 1942, is a nullity, and

(c) Denying leave to the plaintiffs herein to amend the complaint in accordance with the said proposed amended complaint, and

(d) In the event that the said motion be denied and that the plaintiffs' complaint be amended in accordance with the proposed amended complaint,

1. Dismissing the amended complaint herein under Rule 12 of the Rules of Civil Procedure on the ground
767 that the said amended complaint fails to state a cause of action against the defendant, Carl Zeiss, Inc., and

2. Granting summary judgment under Rule 56 of the Rules of Civil Procedure on the ground that the said amended complaint shows that there is no genuine issue as to any material fact therein and that the defendant, Carl Zeiss, Inc., is entitled to judgment as a matter of law,

and said motions having regularly come on to be heard on January 16, 1942,

768

Now, on reading and filing the summons and complaint and Marshal's returns herein, the order to show cause, dated January 6, 1942, and the annexed affidavits of Whitney North Seymour, M. H. Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, all verified January 5, 1942, the notice of motion of Carl Zeiss, Inc., dated January 6, 1942, and the an-

nexed affidavit of Karl A. Bauer, verified January 6, 1942, the proposed amended complaint herein, the order to show cause herein, dated January 14, 1942, and the affidavit of 769
Whitney North Seymour, verified January 14, 1942, annexed thereto, the affidavit of Jack Kemp Busby, verified January 14, 1942, and the copy of notice of rejection of said proposed amended complaint, dated January 14, 1942, annexed thereto, the order to show cause herein, dated January 14, 1942, and the affidavit of Joshua D. Jones, verified January 14, 1942, annexed thereto and the reply affidavit of Whitney North Seymour, verified January 21, 1942, and the Indictment in this Court at the March 1940 Term, Index No. C107-169 entitled United States of America v. Bausch & Lomb Optical Company, et al., the complaint in 770
an action in this Court entitled United States of America v. Bausch & Lomb Optical Company, et al., Civil Action No. 9-404 and the exhibits annexed thereto, all in support of said motions, and the affidavits of Emanuel Thebner and Murray Brensilber, both verified January 15, 1942, as corrected by letter dated January 17, 1942, the complaint and proposed amended complaint herein, the Indictment in this Court at the March 1940 Term entitled United States of America v. Bausch & Lomb Optical Company, et al., Index No. C107-169, the two bills of particulars filed by the United States in said criminal action, the complaint in an action in this Court entitled United States of America v. Bausch & 771
Lomb Optical Company, et al. (Index No. Civ. 9-404), and the Consent Decree entered in said proceeding, all in opposition to defendants' motion, and after hearing Messrs Simpson Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore R. Drescher, and Messrs. Gifford, Woody, Carter & Hays

(Joshua D. Jones, Esq., of counsel) for defendant Carl Zeiss, Inc., in support of said motions, and Emanuel Thebner, Esq. (I. Gainsburg, Esq., of counsel), in opposition
772 thereto, and due deliberation having been had thereon, and the Court not having passed upon the motions of the defendants requesting relief pursuant to Rule 11 of the Federal Rules of Civil Procedure, and on motion of Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and on motion of Messrs. Gifford, Woody, Carter & Hays, attorneys for defendant Carl Zeiss, Inc., it is

773 ORDERED that the proposed amended complaint of the plaintiffs herein is a nullity; and it is further

ORDERED that the plaintiffs herein be and they hereby are denied leave to amend their complaint in accordance with said proposed amended complaint on the ground that the said proposed amended complaint does not state a cause of action.

ALFRED C. COXE,
U. S. D. J.

774

Order and Judgment.

Civ. 17—11

At a Stated Term of the United States District Court, Southern District of New York, for the hearing of Motions, held in the United States Court House, Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 24th day of January, 1942. 775

Present:

HON. ALFRED C. COXE,
United States District Judge.

776

[SAME TITLE]

Defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher having moved, by order to show cause dated January 6, 1942, to dismiss this action and the complaint herein on the ground that the venue of this action as to the said defendants has been improperly laid in the Southern District of New York, and on the ground that the complaint fails to state a claim against these defendants upon which relief can be granted; and for summary judgment on the ground 777 that there is no genuine issue as to any material fact herein, and that these defendants are entitled to judgment against the plaintiffs as a matter of law; and the defendant Carl Zeiss, Inc. having moved by notice of motion dated January 6, 1942, to dismiss this action and the complaint herein on the ground that the complaint fails to state a claim

against it upon which relief can be granted, and for summary judgment on the ground that there is no genuine
778 issue as to any material fact herein and that the said defendant is entitled to judgment against the plaintiffs as a matter of law, and said motions having regularly come on to be heard on January 16, 1942,

Now on reading and filing the summons and complaint and the Marshal's returns herein, the order to show cause dated January 6, 1942, and the annexed affidavits of Whitney North Seymour, M. Herbert Eisenhart, Carl L. Bausch, Theodore B. Drescher, E. Herman Anthes and Russell E. Craytor, all verified January 5, 1942, the notice of motion,
779 dated January 6, 1942, by Carl Zeiss, Inc. and the annexed affidavit of Karl A. Bauer, verified January 6, 1942, and the proposed amended complaint of the plaintiffs herein served on the defendants on January 13, 1942, and the reply affidavit of Whitney North Seymour, verified January 21, 1942, and the Indictment in this Court at the March 1940 Term, Index No. C107-169 entitled United States of American v. Bausch & Lomb Optical Company, et al., the complaint in an action in this Court entitled United States of America v. Bausch & Lomb Optical Company, et al., Civil Action No. 9-404 and the exhibits annexed thereto, all in support of said motions, and the affidavits of Emanuel Thebner and Murray Brensilber, both verified January 15, 1942, as
780 corrected by letter dated January 17, 1942, the complaint and proposed amended complaint herein, the Indictment in this Court at the March 1940 Term entitled United States of America v. Bausch & Lomb Optical Company, et al., Index No. C107-169, the two bills of particulars filed by the United States in said criminal action, the complaint in an action in this Court entitled United States of America

v. Bausch & Lomb Optical Company, et al. (Index No. Civ. 9-404), and the Consent Decree entered in said proceeding, all in opposition to defendants' motion, and after hearing 781
Messrs. Simpson Thacher & Bartlett (Whitney North Seymour, Esq., of counsel) for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher and Messrs. Gifford, Woody, Carter & Hays (Joshua D. Jones, Esq., of counsel) for defendant Carl Zeiss, Inc., in support of said motions, and Emanuel Thebner (I. Gainsburg, Esq., of counsel) in opposition thereto, and due deliberation having been had thereon, and the Court not having passed upon the motion of the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher to dismiss this 782
action and the complaint herein on the ground that the venue of this action as to said defendants has been improperly laid in the Southern District of New York, and on motion of Messrs. Simpson Thacher & Bartlett, attorneys for defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and on motion of Messrs. Gifford, Woody, Carter & Hays, attorneys for defendant Carl Zeiss, Inc., it is

ORDERED, ADJUDGED AND DECREED that the complaint herein be and it hereby is dismissed and that summary judgment be and it hereby is granted to all of the defendants as 783
aforesaid; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher recover of the plaintiffs herein $17.00 and the defendant Carl Zeiss, Inc. recover of the plaintiffs herein $15.00 as and for their costs

herein, as taxed by the Clerk, and that execution issue therefor.

784 Approved January 24th, 1942.

ALFRED C. COXE,
U. S. D. J.

Costs taxed and judgment rendered accordingly February 2, 1942.

GEORGE J. H. FOLLMER,
Clerk

785

786

Notice of Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

787

UNITED STATES OF AMERICA on the relation of MURRAY BRENSILBER and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, in their own behalf,

Plaintiffs,

—against—

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER,

788

Defendants.

SIRS:

PLEASE TAKE NOTICE, that the United States of America on the relation of Murray Brensilber and Emanuel Thebner, and Murray Brensilber and Emanuel Thebner, in their own behalf, plaintiffs, hereby appeal to the Circuit Court of Appeals, for the Second Circuit, from the judgment of the United States District Court for the Southern District of New York entered in the office of the Clerk thereof on the 2nd day of February, 1942, dismissing this action, and said 789
plaintiffs further appeal from the two orders of the said District Court of the United States, made in the above-entitled action, on the 24th day of January, 1942, by Hon. Alfred C. Coxe, District Judge, which said orders (1) grant summary judgment to the defendants and (2) deem the amended complaint a nullity and deny plaintiffs leave

to amend their complaint; and the said plaintiffs herein do hereby appeal from each and every part of the aforesaid judgment and orders, as well as from the whole thereof.

790

Dated: New York, N. Y., February 6, 1942.

Yours, etc.,

EMANUEL THEBNER,
Attorney for Plaintiffs,
Office & P. O. Address:
111 John Street,
Borough of Manhattan,
City of New York.

791 To:

SIMPSON THACHER & BARTLETT, ESQS.,
Attorneys for Defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher,
120 Broadway,
Borough of Manhattan,
City of New York.

GIFFORD, WOODY, CARTER & HAYES, ESQS.,
Attorneys for Defendant, Carl Zeiss, Inc.,
792 1 Wall Street,
Borough of Manhattan,
City of New York.

Stipulation as to Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

793

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the District Court in this case, as agreed on by the parties.

New York, N. Y., May , 1942.

EMANUEL THEBNER,
Attorney for Plaintiffs-Appellants.

794

SIMPSON, THACHER & BARTLETT,
Attorneys for Defendants, Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

GIFFORD, WOODY, CARTER & HAYES,
Attorneys for Defendant, Carl Zeiss, Inc.

795

Clerk's Certificate.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

796

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the
797 above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of May, in the year of our Lord one thousand nine hundred and forty-one and of the Independence of the said United States the one hundred and sixty-fifth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

798

[fol. 267] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 62

(Argued October 16, 1942. Decided November 5, 1942)

UNITED STATES ex rel. MURRAY BRENSILBER et al., Appellants,

v.

BAUSCH & LOMB OPTICAL COMPANY et al., Appellees

Appeal from a summary judgment of the District Court for the Southern District of New York, dismissing an action to recover penalties under § 231 of Title 31, U. S. Code.

Before L. Hand, Augustus N. Hand and Clark, Circuit Judges

Samuel Gottlieb for the appellants.

Whitney North Seymour for Bausch & Lomb Optical Company.

Joshua D. Jones for Carl Zeiss, Inc.

John T. Cahill, *amicus curiae.*

[fol. 268] PER CURIAM:

The statute (§ 231, Title 31, U. S. Code) applies only when the wrongdoer has "presented * * * any claim * * * knowing such claim to be false, fictitious, or fraudulent." Arguendo we shall assume with the plaintiffs that this language includes more than claims which are not justified under contracts between the claimants and the United States; that it is not limited to claims for goods that have not been delivered, or to claims for goods of a kind not specified, or to claims for services that have not been rendered, or to claims computed at prices other than those agreed upon. We assume, that is, that if the claimant has once procured a contract by fraud, any claims he may thereafter present are "fraudulent," whether or not they fall within its terms. That seems to have been the understanding of the Ninth Circuit in *Dimmick* v. *United States,* 116 Fed. Rep. 825, and of the Third Circuit in *United States ex rel. Marcus* v. *Hess,* 127 Fed. (2d) 233. Nevertheless, the statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit,

as appears from the juxtaposition of the three adjectives, "false," "fictitious" and "fraudulent." Therefore, although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non;* it will not serve that he secured it by any other kind of wrong. The distinction is well illustrated in *United States* v. *Hess, supra.* The bidders had there all agreed that the defendant, one of their number, should get the contract; he was to put in a bid in an amount agreed to by all, which the others were to top so that their bids would inevitably be rejected. To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed. The defendant, being a party to this deceit, which was the means [fol. 269] by which he procured his contract, was himself guilty of fraud. In the case at bar the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advantage without which, we will assume—though that is not certain—they would not have secured their contracts with the United States. That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market. Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "reasonable," or "competitive." If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.

This would be the necessary result were the statute of the usual kind and entitled to a broad interpretation; but it is not, for it is not only penal, but drastically penal. *United States* v. *Bittinger,* 24 Fed. Cas. No. 14,599, p. 1150; *United States* v. *Kansas Pacific Ry. Co.,* 26 Fed. Cas. No. 15,500, p. 680; *United States* v. *Russell,* 19 Fed. Rep. 591. For this reason it has been strictly construed. *United States* v. *Shapleigh,* 54 Fed. Rep. 126 (C. C. A. 8); *Olson* v. *Mellon,* 4 Fed. Supp. 947, aff'd 71 Fed. (2d) 1021 (C. C. A. 3); *United States ex rel. Ostrager* v. *New Orleans Chapter,* 127 Fed. (2d) 649, 651 (C. C. A. 5); *United States ex rel.*

Marcus v. *Hess, supra,* 127 Fed. (2d) at 235. Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy.

In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) [fol. 270] to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset. The motion for summary judgment dismissing both was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which § 232 would not protect them. The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud.

Judgment affirmed.

[fol. 271] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of November one thousand nine hundred forty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. MURRAY BRENSILBER, et al., Plaintiffs-Appellants,

v.

BAUSCH & LOMB OPTICAL COMPANY, et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 272] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. Murray Brensilber, et al., v. Bausch & Lomb Optical Company, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 23, 1942. D. E. Roberts, Clerk.

[fol. 273] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted] 21

FEB 23 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HOMER CUMMINGS,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

INDEX.

	Page
Opinion below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	12
Reasons for granting the writ	13
A. The decision of the circuit court of appeals ignores the facts of record and as a matter of law is in conflict with the decisions of this court and the overwhelming weight of authority	14
(1) Misrepresentations of Carl Zeiss are chargeable to Bausch & Lomb	14
(2) The allegations of the complaint and the facts of record considered by the trial court clearly show fraud by Bausch & Lomb in the procurement of its contracts with the United States	16
(a) Bausch & Lomb through "protective offers" by Zeiss, affirmatively misrepresented that lower Bausch & Lomb bids were reasonable and fair	17
(b) The "protective offers" made by Zeiss constituted a continuing misrepresentation that Zeiss was unable for economic reasons to compete in sales of military instruments to the United States	17, 18
(3) The only facts alleged by respondents in their affidavits in no way contradict the basic facts relied upon in the amended complaint and appearing in the record before the court	20
(4) The amended complaint clearly states a cause of action under R. S. secs. 3490 and 5438	22
B. The question involved is of great general importance	23
Conclusion	25
Appendix	26

CITATIONS

CASES.

	Page
Bradford v. *United States*, 129 F. (2d) 274, cert. denied No. 223, this Term	23
City of Oakland v. *California Construction Co.*, 15 Cal. (2d) 573	18
Connecticut Mut. Life Ins. Co. v. *Hillmon*, 188 U. S. 208	16
Cooper Process Co. v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66	19
Hyer v. *Richmond Traction Company*, 168 U. S. 471	17
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229	16
In re Salmon, 145 Fed. 649	17

Page

Jennings County v. *Berbarg*, 63 Ind. 107 18
Leche v. *United States*, 118 F. (2d) 246, cert. denied 314 U. S. 617 ....
McMullen v. *Hoffman*, 174 U. S. 639 17
Shushan v. *United States*, 117 F. (2d) 110, cert. denied 313 U. S. 574 ..
Stewart v. *Wyoming Ranche Co.*, 128 U. S. 383 19
Swan v. *Chorpenning*, 20 Cal. 182 (1862) 18
Tooker v. *Alston*, 159 Fed. 599 19
Triangle Conduit & Cable Co. v. *National Elec. P. Corp.*, 38 F. Supp. 533 11
United States v. *Groves*, 122 F. (2d) 87, cert. denied 314 U. S. 670 ....
United States v. *Newbury Mfg. Co.*, 123 F. 2d 453 11
United States ex rel Marcus v. *Hess*, 127 F. 2d 233 11
United States ex rel Marcus v. *Hess*, U. S. Sup. Ct., January 18, 1943. 22
United States ex rel v. *New Orleans Chapter, Associated General Contractors of America* 23
Weisser v. *Mursam Shoe Corporation*, 127 F. 2d 344 22

STATUTES AND MISCELLANEOUS

Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209 (Shorman Antitrust Act) 16 U. S. C., Sec. 1 6
Act of August 27, 1894, c. 349, Sec. 73, 28 Stat. 509, 570 (Wilson Act) 15 U. S. C., Sec. 8 6
Benedict, Sales (7th ed.) p. 462 19
Borkin, Germany's Master Plan (1943) pp. 285–286 14
Federal Rules of Civil Procedure:
Rule 7(a) 11
Rule 12(b) 11
Rule 15(a) 11
Hamilton, Antitrust in Action, T. N. E. C. 24
Monograph No. 16, pp. 103–104 .....
1 Moore, Federal Practice, p. 428 11
3 Restatement, Torts, Sec. 538 19
Revised Statutes:
Sec. 3490 26
Sec. 3491 26
Sec. 3492 26
Sec. 3493 27
Sec. 5438 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioners, the United States of America ex rel. Murray Brensilber and Emanuel Thebner, and Murray Brensilber and Emanuel Thebner in their own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on November 23, 1942, affirming the judgment of the United

States District Court for the Southern District of New York.

Opinion Below.

The district court filed no opinion. The opinion of the circuit court of appeals (R. 267-269) is reported in 131 F. 2d 545.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on November 23, 1942 (R. 270). The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether, in an action on behalf of the United States under R. S. secs. 3490 and 5438 to recover damages and penalties on account of the presentation for approval and payment of fraudulent claims against the United States, where the complaint relies on admittedly unlawful agreements between an American and a German corporation, the two main competitors in the industry, allotting to the American company all of the business of the United States Government, and where the record before the court shows that under such agreements the German corporation, when invited by the United States to make a bid, was required to submit, and did in fact submit excessive prices (so-called "protective offers") fixed by the American corporation—whether upon such facts, a summary judgment for the American corporation may properly be sustained on the ground that the complaint and the unlawful agreements show no false representations in deceit of the United States.

Statutes Involved.

The statutes involved are Revised Statutes, sections 3490-3493 and 5438. They appear in the appendix, pp. 26-28

Statement.

On December 17, 1941, petitioners, on behalf of the United States and as well in their own behalf brought this action in the Southern District of New York against the respondents to recover the penalties and double damages provided by R. S. sec. 3490 resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S. sec. 5438.[1]

Upon motion by Bausch & Lomb and the individual respondents, officers of Bausch & Lomb (R. 13), and supporting affidavits (R. 17, 32, 33, 34) an order was entered by the district court directing petitioners to show cause why an order should not be entered dismissing the complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 11-12). Carl Zeiss, Inc., filed notice of similar motion (R. 39) and supporting affidavit (R. 41-45).

Thereupon, on January 13, 1942 an amended complaint (R. 78-85) was served upon counsel for Bausch & Lomb and the individual defendants (R. 50) and on counsel for Zeiss (R. 61).

Upon affidavits of counsel for respondents (R. 49, 60) the district court on January 14, 1942, entered new orders directing petitioners to show cause why an order should not be entered (1) striking the original complaint as sham and frivolous (2) determining the amended complaint is a nullity and denying leave to file the amended complaint or (3) dismissing the action and amended complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 46, 47). These orders also stayed petitioners from taking any further proceedings in this action until final decision upon the motion (R. 48, 59).

---

[1] This action was filed about 18 months after the entry on July 9, 1940 of a consent decree in an injunction suit brought by the United States

Petitioners filed affidavits in opposition to the rule (R. 64, 77) and by reference (R. 65) incorporated therein the federal indictment (R. 86) the Government's Bill of Particulars (R. 112, 194)—which included the agreements of Bausch & Lomb with Carl Zeiss of Jena (R. 145, 151, 153, 157)—and also the Government's complaint in equity and the consent decree entered thereon (R. 212, 243).

After hearing January 16, 1942, the court entered its order that the amended complaint is a nullity and denying petitioners leave to amend the complaint in accordance with the proposed amended complaint on the ground that the amended complaint does not state a cause of action (R. 254-258). The original complaint was ordered dismissed and summary judgment entered for respondents (R. 259, 261).

On appeal the circuit court of appeals held (R. 269):

> In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset.

Accordingly the judgment of the district court was affirmed.

The salient facts may be briefly set out in chronological order:

---

under the Anti-trust laws (R. 243-248). In March, 1940 the respondents were indicted in two counts, (1) for conspiracy in violation of the Sherman Act and (2) for conspiracy in violation of Section 73 of the Wilson Act (R. 86-109). On pleas of nolo contendere by Bausch & Lomb and its officers, the individual defendants, judgment was entered May 27, 1940 against each imposing fine on each of them of $5,000 on each count. Later on March 5, 1941, on a similar plea, Carl Zeiss, Inc., was fined $1,000 (R. 110-111).

The illegal combination.—On April 28, 1921, Bausch & Lomb entered into a 25-year agreement with Carl Zeiss of Jena, Germany. This contract provided generally for payment by Bausch & Lomb to Zeiss of royalties—stated to be in consideration for patent licenses and technical assistance—on all sales of military optical instruments by Bausch & Lomb (R. 146). The provisions here important, however, were: Paragraph 3, relating to military optical instruments, by which Bausch & Lomb agreed not to sell such instruments to countries other than the United States and Carl Zeiss agreed "not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution (R. 147).[2] Paragraph 9 provided that the parties "agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances" (R. 149).

On June 27, 1925, paragraph 3 of the agreement was amended by adding an implementation provision (R. 151-152):

> *In the case of inquiries, received* by Bausch & Lomb from authorities outside of the United States of America, *by Carl Zeiss from the authorities of the*

---

[2] Carl Zeiss is a corporation or association existing under the laws of Germany and having its principal place of business at Jena, Germany, where, among other things, it manufactures military optical instruments. "For a number of years, including the three years next preceding the date of the return of this indictment, Zeiss has carried on business in the Borough of Manhattan, City of New York, and within the Southern District of New York, through the instrumentality and agency of Carl Zeiss, Inc., a corporation organized on or about December 11th, 1925, and existing by virtue of the laws of the State of New York, which is a wholly owned subsidiary of Zeiss, and is completely dominated, controlled, and operated by Zeiss" (R. 87-88).

> *United States,* one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection. (Emphasis supplied)

A further amendment on October 28, 1925, to add further modifications as to protective offers when made by Bausch & Lomb, left the above-quoted provision in full effect (R. 153-156).

Later, on November 26 and December 24, 1926 this agreement as modified was supplanted by a new form of contract which narrowed the provisions of Paragraph 3 to mere agreement for an exclusive patent license (R. 157, 159). However, Paragraph 6 of this new agreement contained the following language (R. 159):

> In the production and sale of *nonmilitary* articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. *They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line* (Emphasis supplied).

The indictment.—In March, 1940, the respondents and Carl Zeiss were indicted in two counts for conspiracy in violation of the Sherman Anti-trust Act and in violation of section 73 of the Wilson Act (R. 86-109). This indictment charged that notwithstanding the changes in the form of the supplemented 1921 agreement effectuated by the 1926 agreement, Bausch & Lomb and Zeiss "intended and

continued to carry out" the terms of Paragraph 3 and 9 of the 1921 agreement as supplemented in 1925 (R. 97, 105). Included in the allegations of acts in furtherance of the conspiracy were charges that Zeiss has refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented and Zeiss "on various occasions subsequent to June 27, 1925 has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98). And the indictment concluded that as a result the respondents "have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States" (R. 99). Pleas of *nolo contendere* were entered for all the respondents except Carl Zeiss. The Bausch & Lomb defendants were fined $5,000 on each of the two counts on May 27, 1940, and Carl Zeiss, Inc. was fined $1,000 on March 5, 1941 (R. 110).

The action for injunction.—On July 8, 1940, the United States filed its complaint for injunction against the Bausch & Lomb defendants relying on the same contracts and again alleging that "Notwithstanding this change [in 1926] in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925" (R. 212, 223). On July 9, 1940, a consent decree was entered (R. 243-248) enjoining the defendants, among other things, from conspiring with other manufacturers "To fix or maintain prices, quotations or terms of sale of military optical instruments", "To agree upon the prices which any other manufacturer of military optical instruments shall charge for

such instruments", "To make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments" (R. 245).

Action by petitioners.—The United States for a subsequent period of 18 months took no steps to recover damages resulting from misrepresentations in connection with purchases made during the continuance of the conspiracy. Finally, on December 17, 1941, petitioners filed their original complaint which alleged that respondents with others had been engaged in a conspiracy in the case of sales made to the United States Government to fix, maintain and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments (R. 1, 3-10). Through inadvertence, it was alleged that the unlawful combination required that *neither* of the parties sell to the United States without the consent of the other and that sales made by *either* of them to the Government would contain a markup of 20% to be paid over to the other party (R. 5-6).

Respondents obtained an order to show cause why the complaint should not be dismissed and summary judgment be entered for defendants (R. 11-12).

The amended complaint.—Petitioners thereupon filed an amended complaint which alleged that Bausch & Lomb and Carl Zeiss, Jena, Germany from April 28, 1921 and Carl Zeiss, Inc., from its incorporation in 1925 and the individual defendants from the time they became officers or directors of Bausch & Lomb have up until March 29, 1940 been engaged in a conspiracy (a) to divide the world market for military optical instruments, the exclusive territory of Bausch & Lomb to be the United States and that of Zeiss to be the rest of the world; (b) not to sell in the other's territory without prior consent; and (c) in the case of sales made by consent to fix, maintain and control arbitrary,

artificial and unreasonable prices and terms of sale [3] (R. 78, 80-81). The amended complaint further alleged that both Bausch & Lomb and Carl Zeiss, Jena, have delivered military optical instruments to the United States at arbitrary, artificial and unreasonable and non-competitive prices and Bausch & Lomb have received payment for such instruments (R. 81-82). Bausch & Lomb at various times submitted to the Government bids for contracts for the manufacture and sale of military optical instruments to be used by the United States. "Such bids were at prices that pretended to be and were represented to be, and which the Government of the United States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments" (R. 82). The authorized officers of the United States were without knowledge of the conspiracy and accepted various bids submitted by Bausch & Lomb (R. 82).

The amended complaint also contains the allegation that "the defendants, other than Carl Zeiss, Inc., * * * have presented for payment and approval to various officers of the * * * United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States. * * * the defendants knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defend-

---

[3] It was also alleged that Bausch & Lomb agreed to pay to Zeiss a royalty on the gross sales price of each instrument sold to the United States regardless of whether such equipment was covered in whole or part by Zeiss patents (R. 81).

ants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied" (R. 83).

Proceedings in the district court.—The affidavit of counsel in support of a second order to show cause dated January 14, (R. 49), asserts that the amended complaint should be dismissed and summary judgment granted on the grounds set forth in the attached order to show cause (R. 52). That order founds the motion for summary judgment on the affidavits annexed to the order to show cause dated January 6, 1942, and the attached affidavit of counsel (R. 47).

The affidavit of Herbert Eisenhart, President of Bausch & Lomb—and the only affidavits which purports to set out facts with respect to the conspiracy—incorporates by reference the Government's indictment and equity complaint (R. 23, 24). The equity complaint by reference (R. 221-223) includes the contract of Bausch & Lomb with Carl Zeiss, Jena, dated April 28, 1921 (R. 228) together with its supplements of June 27, 1925 (R. 233) and October 28, 1925 (R. 235), and the contract of November 26-December 24, 1926 (R. 238). This affidavit upon which the second motion for dismissal and summary judgment is based, is admitted to have brought before the court the complete records of the Government's anti-trust proceedings (R. 251), which of course includes the bills of particulars to the indictment (R. 112-208).

After hearing, the trial court entered its order that the amended complaint is a nullity and denying leave to amend in accordance with the proposed amended complaint, on the ground that it does not state a cause of action. Without ruling on the motion to dismiss on the ground that venue was improperly laid, the trial court entered summary judgment for the respondents (R. 259-262).

Decision of the circuit court of appeals.—The appellate court passed the question whether petitioners did not have an unconditional right to amend under Rule 15(a)[4], and conceded that the court was "perhaps wrong" in holding that the amended complaint did not state a cause of action. But the court held (R. 269):

> The motion for summary judgment dismissing both [original and amended complaint] was right because it appears beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts.

Purporting to distinguish the factual situation in *United States ex rel Marcus* v. *Hess*, 127 F. 2d 233, the court said (R. 268):

> In the case at bar the contracts between Bausch & Lomb and Carl Zeiss of Jena (strictly only the second one is relevant) unlawfully gave Bausch & Lomb an advan-

---

[4] Rule 15 (a), Federal Rules of Civil Procedure, provides:

"Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served • • •"

In 1 Moore, Federal Practice, p. 428, it is stated: "A motion is not a pleading. It is defined as 'an application to the court for an order'".

Since a motion is not a pleading, a motion for summary judgment cannot be a "responsive pleading". Therefore petitioners were entitled to amend as of right.

Rule 7 (a) provides:

"Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleading shall be allowed,* except that the court may order a reply to an answer or a third-party answer." (Emphasis supplied.)

Rule 12 (b) also distinguishes between a pleading and a motion. Cf. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453, 454 (C. C. A. 1); contra *Triangle Conduit & Cable Co.* v. *National Elec. P. Corp.*, 38 F. Supp. 533 (Del.) rev'd on other grounds 125 F. 2d 1008.

> tage without which we will assume — though that is not certain — they would not have secured their contracts with the United States. That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market. Plainly a bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "unreasonable", or "competitive". If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been, but not because by bidding he has said anything about competition.

Accordingly the circuit court of appeals entered its order for mandate affirming the judgment of the district court (R. 270).

Specification of Errors to Be Urged.

The circuit court of appeals erred:

1. In holding that the acts of the members in furtherance of, and pursuant to, their unlawful combination to allot all United States Government business to the American corporation involved no representations to the United States upon which to found a charge of fraud in the procuring of contracts with the United States.

2. In failing to hold that the obtaining by an American corporation of the agreements of its principal competitor to abstain from selling military optical instruments to the United States Government clearly involves fraud where such agreement is implemented by the systematic abstention from competitive bidding by such competitor and the making of merely colorable protective bids by such competitor at increased prices fixed by the American corporation.

Reasons for Granting the Writ.

The holding of the circuit court of appeals that the amended complaint must be held to state no cause of action because the acts of the respondents under the unlawful agreements involved no fraud is palpably erroneous.[5]

The arrangement here involved was very simple. Bausch & Lomb and Carl Zeiss of Jena were by far the two largest manufacturers of military optical instruments. To avoid competition with each other and attain the price benefits of a monopoly in the manufacture and sale of military optical instruments, they agreed that Bausch & Lomb should have the exclusive right to sell to the United States Government and that Zeiss should be free of competition from Bausch & Lomb in the sale of such instruments to all other countries. This was more than a mere geographical division. The agreement, so far as Bausch & Lomb was concerned, was aimed directly at the United States Government. The circuit court of appeals concedes that the arrangement between Bausch & Lomb and Zeiss was a "wrong" to the United States, and it cannot be reasonably contended that, to the extent that it resulted in the payment of prices higher than would have been obtained had competition not been thus restrained, the United States was not damaged. The court held, however, that this wrong "was not a 'fraud' unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market." And it held that Bausch & Lomb had made no such representation.

[5] The statement of the court that "the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere" is untenable in law (R. 269). The indictment was for conspiracy, not even requiring proof of an overt act. Damage might or might not be involved. In the instant case, the amended complaint relies on a series of claims which were paid by the United States to its damage by reason of the fact that such claims were based upon prices agreed to as a result of fraud chargeable to Bausch & Lomb.

A. THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORES THE FACTS OF RECORD AND AS A MATTER OF LAW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE OVERWHELMING WEIGHT OF AUTHORITY.

(1) *Misrepresentations of Carl Zeiss are chargeable to Bausch & Lomb.*—In the first place, it is obvious that in holding that Bausch & Lomb had not made fraudulent representations to the United States, the court below has overlooked the responsibility of each conspirator as principal for the acts of the others as his agents. Here the 1921 contract, as supplemented by the two amendments of June and October 1925, required that upon inquiries from the United States, Carl Zeiss should make "protective offers" at an increase over normal price to be named by Bausch & Lomb, but not in excess of a twenty per cent increase. "If the party that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection" (R. 154). Indeed, both the indictment and the complaint in equity alleged that on various occasions subsequent to June 27, 1925 Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss (R. 98, 224).[6] It clearly appears that as late as March,

[6] The continuation of the unlawful agreement expressed in the 1925 modifications of the 1921 contract despite its elimination in form from the 1926 contract is also apparent from the instances cited in the Government's bill of particulars to show that Bausch & Lomb has continued to refuse to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales (R. 97, 121-132). (In 1935 Bausch & Lomb refused contracts with Great Britain and France for $1,500,000 worth of military optical instruments. See Borkin, Germany's Master Plan (1943) pp. 285-286). It also appears from the bill of particulars that Bausch & Lomb has in other instances sold military optical instruments for use outside the United States only after first obtaining the consent of Zeiss as to the sale and the price, the sale in each

1928, long after the purported repudiation of the unlawful agreement, Zeiss, on inquiry from the United States naval attache in Germany, quoted a price on periscopes only after obtaining the consent of Bausch & Lomb to a figure which included ten per cent. payable to Bausch & Lomb (see Exhibit U, R. 188-192). It is, therefore, apparent that such of the facts as may be said to have been before the court by virtue of the references to the indictment and complaint, show conclusively that Zeiss made bids to the United States in furtherance of the conspiracy with Bausch & Lomb. Since these bids were intended to be, and obviously were, mis-

---

case being made at an arbitrary, artificial unreasonable and non-competitive price agreed upon with Zeiss (R. 97, 133-136). Exhibits G and H (R. 162-167) referred to in the bill of particulars at R. 134 translate as follows:

Exhibit G:

"The Argentine Naval Commission of this place is interested in buying from one to six altitude meters of 4 meter (base) in accordance with U. S. army specifications, depending on the number they will buy. We intend to ask from $26,000 to $22,000 per piece. Please cable if you are in agreement with this."

Exhibit H:

"As an exception, we agree to the offer at the price mentioned."

Exhibit G1:

"Russia invites offer for altitude meter of 4 meter (base). We propose to offer one instrument at $25,000; 3 instruments at $24,000 each. Cable whether agree."

Exhibit H1:

"We agree to the prices of the 4 meter altitude meters for Russia."

The absence in this correspondence of any reference to the amount of the increase payable over to Zeiss on these sales might be explained by the fact that the supplemental contracts of 1925 state: "The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%" (R. 152, 154). "Normal price" apparently was "the normal price fixed by the firm of Carl Zeiss" (R. 155). The amount of the arbitrary loading of prices in these transactions, therefore, was probably determinable by reference to normal price lists fixed by Carl Zeiss.

representations in furtherance of the conspiracy, they are chargeable to respondent Bausch & Lomb. In holding to the contrary the circuit court of appeals ignored the decisions of this court establishing that in civil, as well as in the criminal law, each member of the conspiracy is constituted the agent of all and every act and declaration in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

(2) *The allegations of the complaint and the facts of record considered by the trial court clearly show fraud by Bausch & Lomb in the procurement of its contracts with the United States.*—The elimination of Zeiss from competition for United States Government business was effectuated by the following terms of the agreement (R. 151-152, 153-154):

> Carl Zeiss obligates itself not to sell such [military] instruments, directly or indirectly, to the United States, excepting under the following conditions:
>
> In the case of inquiries, received * * * by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. * * * If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

It thus appears that the conspiracy contemplated that ordinarily Zeiss should make no offers or bids to the United States. However, arbitrary refusal by Zeiss to bid or quote prices on invitation might give rise to suspicion of a secret

agreement between the companies. Hence it was provided, that upon invitation, Zeiss should make a bid or offer, not bona fide, but at a higher figure named by Bausch & Lomb. It thus appears that the amended complaint and the record before the courts below clearly showed fraudulent misrepresentations of two types:

(a) *Bausch & Lamb through "protective offers" by Zeiss, affirmatively misrepresented that lower Bausch & Lomb bids were reasonable and fair.*—Whenever, upon inquiry, Zeiss made a bid or quoted a price to the United States, such bid was not bona fide but colorable only. There was in this a clearly fraudulent misrepresentation in that the public officials were left with the impression that the amount of the bid submitted by Zeiss represented that company's judgment that the sum so named was not unreasonable. The fraudulent misrepresentation and effect in inducing the belief that the bid of Bausch & Lomb was not unreasonably high is obvious and well-recognized. *McMullen* v. *Hoffman*, 174 U. S. 639, 647; *United States ex rel. Marcus* v. *Hess*, U. S. Sup. Ct., January 18, 1943, p. 4; *In re Salmon*, 145 Fed. 649, 652; see *Hyer* v. *Richmond Traction Company*, 168 U. S. 471, 477. The holding of the court that there is no allegation or showing of fraudulent misrepresentation by Bausch & Lomb is in conflict with these decisions of this court.

This plan of misrepresentation is set out in the allegations that bids by Bausch & Lomb "were at prices that pretended to be and were represented to be, and which the government of the United States and its authorized representatives believed to be the normal, prevailing and competitive prices * * *" (R. 82).

(b) *The "protective offers" made by Zeiss constituted a continuing misrepresentation that Zeiss was unable for economic reasons to compete in sales of military instru-*

ments to the United States.—There is support for the proposition that even when Zeiss, pursuant to the agreement, merely refrained from bidding and Bausch & Lomb obtained government contracts, such contracts are properly to be regarded as having been obtained by fraud. The authorities recognize that where the contractor thwarts the competitive bidding process by conspiracy, there is no difference in the result to the public body whether the fraud is effectuated by colorable or complimentary bids made by other prospective bidders or by their mere failure to bid. In either case, the government is deprived of the benefits of competition which it would otherwise have had, and the fraud upon the public body as the result of the concealed joinder of interest is of equal vice, *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573, 576, 578 (1940); *Jennings County* v. *Verbarg*, 63 Ind. 107, 111; see *Swan* v. *Chorpening*, 20 Cal. 182 (1862).

But it is unnecessary to go so far in the instant case. For it appears that Zeiss was not merely bound negatively to refrain from selling to the United States. Here it was part of the design and plan that the illegal arrangement be affirmatively concealed from the United States by protective bids and, if pressed, by what would amount to protective sales. In furtherance of the expressed purpose of concealment (R. 149), the bids aperiodically submitted by Zeiss upon inquiries from the United States amounted to representations, not only that they were bona fide, but, because under the conspiracy they were required to be up to twenty per cent higher than the normal price, they also amounted to a series of continuing misrepresentations that in truth, in the sale of military instruments in the United States, Zeiss was unable to compete with Bausch & Lomb. The natural and intended tendency then was to suppress the truth and avoid investigations by United States officials which might have earlier disclosed the illegal conspiracy.

By the uniformly higher Zeiss bids submitted over a long period of time, the Government officials were thus led to assume that in instances where Zeiss failed to submit a bid it was not because of conspiracy but because of inability to quote competitive prices through economic reasons.

The tendency of this second misrepresentation to mislead, through what might be called a course of conduct, was plainly equally vicious in that it indicated that the Bausch & Lomb bids were probably fair and reasonable.

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction. (3 Restatement, Torts, sec. 535).

Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. *Copper Process Co.* v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66, 73. Benjamin, Sales (7th ed.) p. 462 "The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of materials facts not equally within the knowledge or reach of the plaintiff." *Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 388. It is, therefore, submitted that within the meaning of R. S. sec. 5438 the misrepresentations by Carl Zeiss, chargeable to Bausch & Lomb, which clearly aided in concealing the existence of the combination and the thwarting of investigation and inquiry, did constitute fraud. *Tooker* v. *Alston*, 159 Fed. 599, 603.

(3) *The only facts alleged by respondents in their affidavits in no way contradict the basic facts replied upon in the amended complaint and appearing in the record before the court.*—The affidavit of M. Herbert Eisenhart, President of Bausch & Lomb (R. 17-31), was relied upon as a basis for the application for order to show cause why summary judgment should not be entered on the original complaint (R. 11-12). It was also relied upon as a basis for the application for a similar order on the amended complaint (R. 47, 52). A careful reading of this affidavit discloses that aside from conclusions of law, the affidavit is directed almost entirely at the inadvertent charge in the original complaint that Bausch & Lomb was required to include in its bids to the United States an increase of up to twenty per cent over the regular price. This allegation was corrected in the amended complaint and was in any event not essential to show the fraud relied upon. In any event, the amount by which Bausch & Lomb was, under the conspiracy, enabled to increase its prices to the United States obviously goes only to the question of the amount of damages.[7]

The affidavit first points out that Mr. Isseks in the course of the criminal proceedings stated: "* * * there is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). This statement was of course accurate. The charge in the indictment was not based on fraud. On the other hand, even if this statement be regarded as a conclusion by Mr. Isseks that respondents had not in fact defrauded the United States, it was merely his individual view of a question of civil liability beyond the scope of his duties and not before

---

[7] Whether the consideration for the agreement between the conspirators was the payment by Bausch & Lomb of all or part of the purported royalalties or merely a reciprocal agreement for the exclusive right to sell to the named purchasers was equally immaterial on the question of fraud *vel non*.

the court. The affidavit alleges that "the 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by Bausch & Lomb to the United States Government" (R. 27). This statement, of course, merely contradicts the provisions of the agreement itself which was specifically directed at the United States; it also is in conflict with the facts appearing in the bill of particulars (*supra*, pp. 14-15).

The affidavit next denies (R. 27-28) that the agreement included a requirement that Bausch & Lomb inflate its bids to the United States "by 20% or any other amount, to be paid to Carl Zeiss, of Jena, but there was no such inflation of bids". It then asserts: "The price to be charged to the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone without the participation or consent of any other organization."

This statement does not deny that Bausch & Lomb independently and alone, by virtue of the elimination of Zeiss from competition, was able to increase its price to a figure in excess of that which would have been bid in the presence of competition. Whether this excess was to be paid over to Zeiss or retained in toto by Bausch & Lomb was of course irrelevant so far as fraud and injury to the United States was concerned.

The next pertinent statement is (R. 29):

> At no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party.

This statement falls far short of categorically negativing the making of "protective offers" by Zeiss. However, if

so regarded, it is contradicted by the facts appearing in the bill of particulars (supra, p. 15, note 5; Exhibit U, R. 188-192).

The affiant closes with a sweeping conclusion of law that Bausch & Lomb at no time has submitted any claim upon the Government of the United States which was false, fictitious or fraudulent. The circuit court of appeals did not rely on the allegations of this or any other affidavit, and it is submitted that in their nature they can afford no support for the judgment here.

Since the issues in this case were raised by motion for summary judgment, and since the allegations of fact by the respondents—if they may properly be regarded as even controverting the allegations essential to the charge of fraud contained in the amended complaint—are in any event clearly in conflict with the documents before the court, the granting of summary judgment was clearly erroneous. *Weisser* v. *Mursam Shoe Corporation,* 127 F. 2d 344, 346.

(4) *The amended complaint clearly states a cause of action under R. S. secs. 3490 and 5438.*—Since the amended complaint and the record show that contracts obtained by Bausch & Lomb were obtained by fraudulent means, it necessarily follows that the respondents come within the prohibition of R. S. sec. 5438:

> Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * *

As was held in *United States ex rel. Marcus* v. *Hess,* U. S. Sup. Ct., January 18, 1943, "This fraud did not spend itself with the execution of the contract. * * * The initial

fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded."

B. THE QUESTION INVOLVED IS OF GREAT GENERAL IMPORTANCE.

In its essence, the decision of the circuit court of appeals amounts to no more than a flat holding that one, who by conspiracy procures another to make misleading representations to the United States by way of mere colorable bids and is thereby enabled to increase the amount of his lower and successful bid for the same contract, nevertheless commits no fraud because no representation has been made by him.

Obviously, such a doctrine must adversely affect civil suits by the United States or other public bodies to recover on account of such frauds. With the ever increasing activities of the federal government the result must necessarily be to seriously embarrass criminal prosecutions as well. The concern of the Department of Justice is perhaps indicated by the criticism directed at this decision in the brief amicus filed by the Solicitor General at the request of this Court in *United States ex rel. Marcus* v. *Hess* (No. 173) and *United States ex rel.* v. *New Orleans Chapter, Associated General Contractors of America.* In that brief, referring to the decision of the circuit court of appeals in instant case, the Solicitor General said (p. 45 note):

> However, we think the court erred in limiting the scope of the fraud condemned by 31 U. S. C. 231 to the "accepted sense of deceit". We believe that fraud as used in this statute covers a broader ground than the ancient crime of false pretenses. See *Bradford* v. *United States*, 129 F. (2d) 274 (C. C. A. 5), certiorari denied November 23, 1942, No. 455, this Term; *Pandolfo* v. *United States*, 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term;

United States v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States*, 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States*, 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574.

Regard must also be had for the fact that rulings such as this must seriously influence the Comptroller General in passing upon claims for payment.

Obviously, there is but little deterrent to frauds on the United States if corporations such as those here involved may embark on a course of law violation with possibility of millions in gain at the risk of relatively negligible fines in the maximum amount fixed by the antitrust laws. Here, apparently the company president would treat the criminal indictment and his plea of *nolo contendere* as exonerating from any further liability (R. 24). The present inadequacy of the criminal proceeding even as a deterrent is pointed out in Hamilton, Antitrust in Action, T. N. E. C. Monograph No. 16, pp. 103-104:

> The criminal process results in a verdict of guilt; its satisfaction is a fine. The penalties are always pecuniary, respectable men of business do not go to jail. * * *
>
> A fine of a dime will hardly stop the filching of a dollar; the risk of a $5,000 penalty is not guaranteed to kill off a conspiracy that promises to net five millions. If a legal threat is to deter, the impact of the punishment must be worthy of the crime. * * *
>
> The shift to a civil action improves the weapon. It creates a responsibility alike corporate and personal, makes substantial damages a term in the businessmen's equation, renders it far more certain that the penalty will follow the illegal act, places a deterrent before the breach of the law. In a word, it attempts to make restraint of trade a bad business risk.

Where as here the amended complaint and facts before the court so strongly indicate that the United States has in fact suffered injury to its property interests, the civil sanctions specified by the Congress for the protection of such interests is not lightly to be cut short by summary judgment.

Conclusion.

The question here involved is not merely of interest to the litigants, but rather of great general importance to the United States. It is respectfully submitted, therefore, that there is presented a proper occasion for the exercise of the supervisory power of this Court.

HOMER CUMMINGS,
Counsel for Petitioner.

CUMMINGS & STANLEY,
Of Counsel.

February, 1943.

APPENDIX.

Sections 3490-3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C., Sections 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, whersoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order,

not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person hav-

ing authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Specification of errors	10
Summary of argument	10
Argument	
I. Actionable fraud is here sufficiently alleged because it is pleaded that respondents both are government contractors and have procured their most important competitor to refrain from bidding or to submit inflated bids	14
II. So long as the United States is cheated, under the statute it is immaterial that respondents have not made affirmative misrepresentations; but, in any event, affirmative misrepresentations were made and are here pleaded	25
Conclusion	36
Appendix	37

CITATIONS.

Cases.

City of Oakland v. *California Construction Co.*, 15 Cal. (2d) 573	22
Connecticut Mut. Life Ins. Co. v. *Hillmon*, 188 U. S. 208	31
Copper Process Co. v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66	36
Crawford v. *United States*, 212 U. S. 183	14
Dimmick v. *United States*, 116 Fed. 825	17
Hyer v. *Richmond Traction Company*, 168 U. S. 471	29, 35
Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229	31
In re Salmon, 145 Fed. 649	25, 35
Jennings County v. *Verbarg*, 63 Ind. 107	22
McMullen v *Hoffman*, 174 U. S. 639	22, 23, 25, 30, 35
Pittsburgh D. & C. Co. v. *Monongahela & W. D. Co.*, 139 Fed. 780	25
Reinstine v. *Rosenfield* 111 F. 2d 892	30
Regan v. *Babcock*, 188 Minn. 192	24
Stewart v. *Wyoming Ranche Co.*, 128 U. S. 383	36
Swan v. *Chorpenning*, 20 Cal. 182 (1862)	22
Tooker v. *Alston*, 159 Fed. 599	36
Triangle Conduit & Cable Co. v. *National Elec. P. Corp*, 38 F. Supp. 533	12
United States v. *Amster*, 273 Fed. 532	29
United States v. *Newbury Mfg. Co.*, 123 F. 2d 453	12
United States ex rel. Marcus v. *Hess*, 317 U. S. 537	14, 17, 21, 23, 26, 27, 28, 30, 35
Veazie v. *Williams*, 8 How. (49 U. S.) 134	23, 31
Weisser v. *Mursam Shoe Corporation*, 127 F. 2d 344	21

Statutes and Miscellaneous.

	Page
Benjamin, Sales (7th ed.) p. 462	36
Borkin, Germany's Master Plan (1943), pp. 285-286	32
Federal Rules of Civil Procedure:	
Rule 7(a)	12
Rule 10(c)	12
Rule 12(b)	12
Rule 15(a)	9, 12
Rule 56(c)	12, 18
1 Moore, Federal Practice, p. 428	12
3 Restatement, Torts, Sec. 538	35-36
Revised Statutes:	
Sec. 3490	3, 4, 37
Sec. 3491	3, 37
Sec. 3492	3, 37
Sec. 3493	3, 37
Sec. 5438	3, 10, 14 26, 28, 36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The district court filed no opinion. The opinion of the circuit court of appeals (R. 267-269) is reported in 131 F. 2d 545.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on November 23, 1942 (R. 270). Petition for writ of certiorari was filed February 23, 1943, and was granted May 3, 1943 (R. 271). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether, under a statute which imposes liability upon every person who presents "fraudulent" claims for "payment" by the United States, a cause of action is stated upon allegations that those charged secured their only important competitor either to refrain from bidding on government contracts or to submit inflated bids, entered into an arrangement for participation in the proceeds of such colorable bids if any should be accepted by the United States, and, under the protection of such arrangement, engaged in securing and fulfilling government contracts and seeking and securing payment therefor from the United States.

2. Whether, under a statute which requires only that there shall have been a "fraudulent" scheme and that the parties charged shall have sought "payment" from the United States, a court may properly dismiss a complaint for failure to state a cause of action on the ground that although what was "done was a wrong * * * it was not a 'fraud' unless [the parties charged] represented at some stage of the negotiations [with the United States] that they had not secured an unlawful monopoly of the market"; and whether, assuming that the statute requires the making of affirmative misrepresentations in addition to the underlying fraudulent scheme, such requirement is satisfied by (1) the submission of bids on government orders as though competitive and fair while concealing the collusive arrange-

ment by which competition was eliminated and (2) procuring a competitor either to refrain from bidding or to submit inflated bids in order that the bids of the party charged may seem fair and reasonable and that it may appear that the competitor could not bid successfully for economic reasons.

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, sec. 3490:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the do-

ing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Revised Statutes secs. 3491-3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S. sec. 3490, are printed in the Appendix.

Statement.

This is a *qui tam* action brought pursuant to R. S. §3490 to recover penalties and double damages on account of a fraud upon the United States through collusive bidding, in which the trial court dismissed the complaint for failure to state a cause of action, the Circuit Court of Appeals for the Second Circuit affirmed, and this Court granted certiorari. The essential facts and history of the relevant proceedings, in chronological order, are briefly as follows:

The illegal combination.—On April 28, 1921, Bausch & Lomb entered into a 25-year agreement with Carl Zeiss of Jena, Germany, providing generally for payment of royalties by Bausch & Lomb to Zeiss—stated to be in consideration for patent licenses and technical assistance—on all sales of military optical instruments by Bausch & Lomb (R. 146). Paragraph 3, relating to military optical instruments, contains an arrangement by which Bausch & Lomb agreed not to sell such instruments to countries other than the United States and Carl Zeiss agreed "not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution" (R. 147). Paragraph 9 provided that the parties "agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances" (R. 149).

On June 27, 1925, Paragraph 3 of the agreement was amended by adding the following provision (R. 151-152):

> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

A further amendment on October 28, 1925, to add further modifications as to protective offers when made by Bausch & Lomb, left the above-quoted provision in full effect (R. 153-156).

Later, on November 26 and December 24, 1926, this agreement, as modified, was supplanted by a new form of contract, which narrowed the provisions of Paragraph 3 to an agreement for an exclusive patent license (R. 157, 159). However, Paragraph 6 of this new agreement contained the following language (R. 159):

> In the production and sale of *nonmilitary* articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. *They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line.* (Emphasis supplied.)

The Government's criminal proceedings.—In March, 1940, the respondents,—i. e., the Bausch & Lomb respondents as

well as Carl Zeiss of Jena, Germany, and Carl Zeiss, Inc.[1] —were indicted on two counts, for conspiracy in violation of the Sherman Anti-trust Act and in violation of section 73 of the Wilson Act (R. 86-109). This indictment charged that, notwithstanding the changes in the form of the supplemented 1921 agreement effectuated by the 1926 agreement, Bausch & Lomb and Zeiss "intended and continued to carry out" the terms of Paragraphs 3 and 9 of the 1921 agreement as supplemented in 1925 (R. 97, 105). Included in the allegations of acts in furtherance of the conspiracy were charges that Zeiss had refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented and Zeiss "on various occasions subsequent to June 27, 1925 has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98). And the indictment concluded that as a result the respondents "have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States" (R. 99). Pleas of *nolo contendere* were entered for all the respondents except Carl Zeiss. The Bausch & Lomb defendants were fined $5,000 on each of the

---

[1]Bausch & Lomb and its officer defendants—M. H. Eisenhart, Carl L. Bausch, and Theodore B. Drescher—are hereinafter sometimes referred to as the "Bausch & Lomb respondents".

Carl Zeiss of Jena, a German corporation, though named as a defendant in the indictment and in the subsequent equity suit brought by the United States was not found in the jurisdiction and never became a party to any of the proceedings.

Carl Zeiss, Inc., a New York corporation organized on or about December 11, 1925, and wholly owned, completely dominated, controlled and operated by Carl Zeiss of Jena, Germany, was the instrumentality or agency through which the latter carried on business in the Southern District of New York (R. 87-88).

two counts on May 27, 1940, and Carl Zeiss, Inc. was fined $1,000 on March 5, 1941 (R. 110).

The Government's action for injunction.—On July 8, 1940, the United States filed its complaint for injunction against the Bausch & Lomb defendants relying on the same contracts and again alleging that "notwithstanding [the] change [in 1926] in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925" (R. 212, 223). On July 9, 1940, a consent decree was entered (R. 243-248) enjoining the defendants, among other things, from conspiring with other manufacturers "to fix or maintain prices, quotations or terms of sale of military optical instruments", "to agree upon the prices which any other manufacturer of military optical instruments shall charge for such instruments", or "to make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments" (R. 245).

Action by petitioners.—The United States for a subsequent period of 18 months took no steps to recover damages resulting from misrepresentations in connection with purchases made during the continuance of the conspiracy. Finally, on December 17, 1941, petitioners filed their original complaint which alleged that respondents with others had been engaged in a conspiracy in the case of sales made to the United States Government to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of military optical instruments (R. 1, 3-10). It was mistakenly alleged that the unlawful combination required that *neither* of the parties sell to the United States without the consent of the other and that sales made by *either* of them to the Government would contain a markup of 20% to be paid over to the other party (R. 5-6).

The amended complaint.—Upon motion (R. 13) and affidavits (R. 17, 32, 33, 34), respondents obtained an order to

show cause why the complaint should not be dismissed and summary judgment entered for defendants (R. 11-12). Thereupon, on January 13, 1942, an amended complaint (R. 78-85) was served (R. 50, 61).

Final proceedings in the district court.—The district court thereupon, on January 14, 1942, entered new orders directing petitioners to show cause why an order should not be entered (1) striking the original complaint as sham and frivolous, (2) determining the amended complaint is a nullity and denying leave to file the amended complaint, or (3) dismissing the action and amended complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 46, 57). These orders also stayed petitioners from taking any further proceedings in the action until final decision upon the motion (R. 48, 59). Affidavits filed in connection with these orders brought before the court all of the records in the earlier government proceedings.[2]

---

[2]Counsel for respondents filed new affidavits in connection with the second order to show cause (R. 49, 60). The affidavit of counsel for Bausch & Lomb in support of the second order to show cause (R. 49) asserts that the amended complaint should be dismissed and summary judgment granted on the grounds set forth in an attached order to show cause (R. 52). That order founds the motion for summary judgment on the affidavits annexed to the earlier order to show cause dated January 6, 1942, and the attached affidavit of counsel (R. 47).

The affidavit of Herbert Eisenhart, President of Bausch & Lomb—and the only affidavit which purports to set out facts with respect to the conspiracy—incorporates by reference the Government's indictment and equity complaint (R. 23, 24). The equity complaint by reference (R. 221-223) includes the contract of Bausch & Lomb with Carl Zeiss, Jena, dated April 28, 1921 (R. 228) together with its supplements of June 27, 1925 (R. 233) and October 28, 1925 (R. 235), and the contract of November 26-December 24, 1926 (R. 238). This affidavit upon which the second motion for dismissal and summary judgment is based, is admitted to have brought before the

After hearing argument, the court entered its order that the amended complaint is a nullity and denying petitioners leave to amend the complaint in accordance with the proposed amended complaint on the ground that the amended complaint does not state a cause of action (R. 254-258). The original complaint was ordered dismissed and summary judgment entered for respondents (R. 259-262).

Decision of the circuit court of appeals.—On appeal the circuit court of appeals held (R. 269):

> In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset.

Holding that what respondents did "was a wrong, but it was not a 'fraud' " (R. 268), the circuit court of appeals entered its order for mandate affirming the judgment of the district court (R. 270). The relevant allegations of fact and the reasoning of the court below are set forth in the argument *infra*.

---

court the complete records of the Government's anti-trust proceedings (R. 251), which of course includes the bills of particulars to the indictment (R. 112-208).

Petitioners filed affidavits in opposition to the rule (R. 64, 77) and by reference (R. 65) incorporated therein the federal indictment (R. 86), the Government's Bill of Particulars (R. 112, 194)—which included the agreements of Bausch & Lomb with Carl Zeiss of Jena (R. 145, 151, 153, 157)—and also the Government's complaint in equity and the consent decree entered thereon (R. 212, 243).

Specification of Errors.

The circuit court of appeals erred:

1. In holding that the acts of the members in furtherance of, and pursuant to, their unlawful combination to allot all United States Government business to the American corporation involved no representations to the United States upon which to found a charge of fraud in the procuring of contracts with the United States.

2. In failing to hold that the obtaining by an American corporation of the agreements of its principal competitor to abstain from selling military optical instruments to the United States Government clearly involves fraud where such agreement is implemented by the systematic abstention from competitive bidding by such competitor and the making of merely colorable protective bids by such competitor at increased prices fixed by the American corporation.

Summary of Argument.

I. The statute here involved requires pleading and proof only that, (a) with knowledge that they are a part or culmination of a "fraudulent" scheme, (b) the parties charged shall have submitted claims for "payment" by the United States. R. S. §5438. Here the pleadings set forth (a) that respondent Bausch & Lomb and its largest and only serious competitor, Zeiss, undertook to divide the world market for military optical instruments leaving the United States government market to Bausch & Lomb, that when pressed to bid on United States government contracts Zeiss would make inflated "protective offers" and—if any such were accepted by the United States—turn over the inflated portion of such prices to Bausch & Lomb, and (b) that Bausch & Lomb submitted bids and received payments from the United States at the unreasonably high prices so artificially fixed and controlled. The facts so pleaded are sufficient allega-

tions of three kinds of fraud—(1) securing a competitor to refrain from bidding, (2) procuring a competitor to submit inflated bids, and (3) participating secretly in the proceeds of such colorable bids as were accepted by the United States. The courts below, therefore, improperly sanctioned summary judgment for the respondents on the ground of failure to state a cause of action.

II. The first and third clauses of the statute here involved, unlike the second clause, require only that there shall have been a "fraudulent" scheme and that, at some time, the parties charged shall have sought "payment" from the United States as a part or culmination of such scheme. The court below, however, ignored the statute by requiring that respondents must not only be guilty of wrong but, in addition, must "at some stage of the negotiations" with the United States have made affirmative misrepresentations in denial of their own fraud. In so proceeding the court below manifestly misconstrued the statute by adding a new requirement or bar to liability, and thereby emasculated the first and third clauses of the statute. In any event, the facts pleaded indicate that respondents have made the following types of misrepresentations: (1) By submitting bids to the United States while concealing their arrangements with Zeiss, respondents have deceitfully represented that their bids are competitive and fair. (2) Through their co-conspirator or agent, Zeiss, respondents have secured the withholding of bids or the making of inflated and colorable bids and thus have fraudulently made it appear to the contracting officers of the United States (a) that the bids of Bausch & Lomb by comparison were fair and reasonable and (b) that Zeiss was unable for economic reasons to compete in sales of military instruments to the United States. These were affirmative, fraudulent, and false representations and, to the extent that the statute may be deemed to require affirmative representations, satisfy every such requirement.

Argument.

It is clear that, under the Rules of Civil Procedure, petitioners were entitled as of right to file their amended complaint—as the court below acknowledged but found it unnecessary to decide (R. 269).[3] The essential question

---

[3]Rule 15 (a), Federal Rules of Civil Procedure, provides: "Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served." In 1 Moore, Federal Practice, p. 428, it is stated: "A motion is not a pleading. It is defined as 'an application to the court for an order'." Since a motion is not a pleading, a motion for summary judgment cannot be a "responsive pleading". Therefore petitioners were entitled to amend as of right.

Moreover, the Rules of Civil Procedure do not include motions in the category of pleadings. Rule 7 (a) provides: "Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleading shall be allowed*, except that the court may order a reply to an answer or a third-party answer." (Emphasis supplied.) Rule 12 (b) also distinguishes between a pleading and a motion. Cf. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453, 454 (C. C. A. 1); contra *Triangle Conduit & Cable Co.* v. *National Elec. P. Co.*, 38 F. Supp. 533 (Del.) rev'd on other grounds 125 F. 2d 1008.

In any event, the various affidavits, submitted in connection with the rules to show cause, incorporate by reference all the basic facts and exhibits as set forth in the government proceedings (see note 2 *supra*) and thus supply any omissions and correct any misstatements in petitioners' original complaint. Summary judgment, as is here involved, is rendered on "the pleadings, depositions, and admissions on file, together with the affidavits" (Rule 56 (c), Rules of Civil Procedure). "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes" (Rule 10 (c), Rules of Civil Procedure).

treated by the courts below was the sufficiency of the amended complaint to state a cause of action (R. 258, 269) and, accordingly, the question here is the same.

The holding of the circuit court of appeals that the amended complaint must be held to state no cause of action because the acts of the respondents under the unlawful agreements involved no fraud is palpably erroneous.[4] The arrangement here involved was simple. Bausch & Lomb and Carl Zeiss of Jena were by far the two largest manufacturers of military optical instruments. To avoid competition with each other and attain the price benefits of a monopoly in the manufacture and sale of military optical instruments, they agreed that Bausch & Lomb should have the exclusive right to sell to the United States Government and that Zeiss should be free of competition from Bausch & Lomb in the sale of such instruments to all other countries. The agreement, so far as Bausch & Lomb was concerned, was aimed directly at the United States Government. The circuit court of appeals concedes that the arrangement between Bausch & Lomb and Zeiss was a "wrong" to the United States, and it cannot be reasonably contended that, to the extent that it resulted in the payment of prices higher than would have been obtained had competition not been thus restrained, the United States was not damaged. This Court has long held that fraud may "be perpetrated by getting the contract at a higher price than otherwise would have been obtained" and that such a con-

---

[4]The statement of the court that "the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere" is untenable in law (R. 269). The indictment was for conspiracy, not even requiring proof of an overt act. Damage might or might not be involved . In the instant case, the amended complaint relies on a series of claims which were paid by the United States to its damage by reason of the fact that such claims were based upon prices agreed to as a result of fraud chargeable to Bausch & Lomb.

tract results "in defrauding the United States by causing it to pay more * * * than was necessary. *Crawford* v. *United States*, 212 U. S. 183, 192. The court below, however, held that this wrong "was not a 'fraud' unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market"; and it held that Bausch & Lomb had made no such representation (R. 268).

I. ACTIONABLE FRAUD IS HERE SUFFICIENTLY ALLEGED BECAUSE IT IS PLEADED THAT BAUSCH & LOMB IS BOTH A GOVERNMENT CONTRACTOR AND HAS PROCURED ITS MOST IMPORTANT COMPETITOR TO REFRAIN FROM BIDDING OR TO SUBMIT INFLATED BIDS.

A fraud upon the United States, actionable under R. S. §§3490-3493 and 5438, is here alleged because it is pleaded that the Bausch & Lomb respondents (a) are in the business of performing government contracts and have submitted bids and bills to, and pursuant to such bids and bills have collected payment from, the United States and (b) at the same time have procured their most important and only serious competitor to refrain from bidding or have caused it to submit inflated bids. Carl Zeiss, Inc., is alleged to have refrained from selling to the United States Government and thereby to have aided the conspiracy (R. 83, 100). The relevant statutes embrace fraud, the pleadings contain the facts, and the decisions affirm such facts as actionable.

The statute.—In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 539-540, this Court has set forth the interrelations of R. S. §§5438 and 3490-3493. They provide for the collection of double damages and penalties against any who commit acts within one or more of the several clauses of R. S. §5438, 12 Stat. 696. The first clause embraces

> every person who makes * * * or presents * * * for payment or approval * * * any claim upon or against the Government of the United States * * * knowing such claim to be * * * fraudulent.

The third clause embraces

> every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining * * * the payment or allowance of any * * * fraudulent claim.

In essence, therefore, the statute imposes liability—so far as here important—upon those who do two things: (1) submit claims for "payment" by the United States, (2) knowing that such claims are "fraudulent." The statute says no more, so that the statutory words "payment" and "fraudulent" are to be taken in their ordinary significance.

The pleadings.—In accordance with the foregoing two elements of the statute, the pleadings cover both (1) the fraud or fraudulent scheme of the respondents and (2) their submission, with knowledge, of claims for payment by the United States pursuant to, or growing out of, such fraudulent scheme:

(1) In addition to the basic agreements and practices pleaded, whereby Zeiss was either to refrain from bidding upon United States military government orders or to submit inflated bids and turn over a portion of the receipts in case such bids were accepted by the United States government (*supra*, pp. 4-8), the amended complaint alleged that Bausch & Lomb and Carl Zeiss, Jena, Germany from April 28, 1921 and Carl Zeiss, Inc., from its incorporation in 1925 and the individual defendants from the time they became officers or directors of Bausch & Lomb have up until March 29, 1940 been engaged in a conspiracy (a) to divide the world market for military optical instruments, the exclusive territory of Bausch & Lomb to be the United

States and that of Zeiss to be the rest of the world, (b) not to sell in the other's territory without prior consent, and (c) in the case of sales made with such prior consent to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale[5] (R. 78, 80-81). It further alleged that both Bausch & Lomb and Carl Zeiss, Jena, have delivered military optical instruments to the United States at arbitrary, artificial, unreasonable, and non-competitive prices and that Bausch & Lomb have received payment for such instruments (R. 81-82). It pleaded that Bausch & Lomb at various times submitted to the Government bids for contracts for the manufacture and sale of military optical instruments to be used by the United States (R. 82):

> Such bids were at prices that pretended to be and were represented to be, and which the Government of the United States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments.

It was also pleaded that the authorized officers of the United States were without knowledge of the conspiracy and accepted various bids submitted by Bausch & Lomb (R. 82). These allegations set forth the basic fraudulent scheme of respondents, upon which their liability in damages is predicated.

(2) As to the second basic element of the statute, the presentation of claims to the United States for payment, the amended complaint alleged that (R. 83):

---

[5]It was also alleged that Bausch & Lomb agreed to pay to Zeiss a royalty on the gross sales price of each instrument sold to the United States regardless of whether such equipment was covered in whole or part by Zeiss patents (R. 81).

> the defendants, other than Carl Zeiss, Inc., * * * have presented for payment and approval to various officers of the * * * United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States. * * * The defendants knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied.

There were thus pleaded both (1) a fraudulent scheme, agreement, combination, or conspiracy relating to government contracts and (2) the consequent presentation of claims for payment by the United States. The one, of course, is inseparable from the other. It will not avail respondents to say that the presentations for payment must be considered alone and without reference to the previously entered combination or agreement. As this Court has lately said:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate * * * The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money. (*United States ex rel. Marcus* v. *Hess, supra,* pp. 543-544).

The court below was equally specific in the instant case (R. 267):

> If the claimant has once procured a contract [with the United States] by fraud, any claims he may thereafter present [to the United States] are "fraudulent" whether or not they fall within its terms.

See to the same effect the decision of the Ninth Circuit in *Dimmick* v. *United States,* 116 Fed. 825, 828:

> The character of the claim—that is to say, whether * * * honest, or * * fraudulent—must be determined in view of all of the facts and circumstances attending it. If it be originally * * * fraudulently concocted, its presentation for payment with knowledge of the facts must necessarily be fictitious and fraudulent.

Petitioners find no rule, principle, or decision to the contrary.

The sole question here, therefore, is whether the facts pleaded constitute sufficient allegations of fraud independently of the subsequent submittal of vouchers, bills, affidavits, or accounts. The latter are merely acts in consummation of the fraud. They relate the fraud to the United States treasury and are thus an essential element under the statute, but innocence upon their face does not dissipate the underlying fraud.

(3) The affidavits submitted in support of the summary judgment here under review do not alter the state of the pleadings. Such summary judgment is properly entered only if the pleadings and affidavits "show [a] that * * * there is no genuine issue as to any material fact and [b] that the moving party is entitled to a judgment as a matter of law" (Rule 56 (c), Rules of Civil Procedure). The question of law on the pleadings and documentary exhibits heretofore described at length is argued below in showing that the facts so presented are sufficient allegations of fraud and misrepresentation. Respondents' affidavits do not detract from the state of the pleadings as to the allegations of fact, for those affidavits consist of nothing more than general denials, statements contrary to the documents of record, contradictions of the facts pleaded, or immaterial assertions. Both courts below, moreover, have quite obviously treated the issue here as one solely of law.

The only facts alleged by respondents in their affidavits in no way contradict the basic facts replied upon in the amended complaint and appearing in the record before the

court. The affidavit of M. Herbert Eisenhart, President of Bausch & Lomb (R. 17-31), was relied upon as a basis for the application for order to show cause why summary judgment should not be entered on the original complaint (R. 11-12). It was also relied upon as a basis for the application for a similar order on the amended complaint (R. 47, 52). A careful reading of this affidavit discloses that, aside from conclusions of law, the affidavit is directed almost entirely at the mistaken charge in the original complaint that Bausch & Lomb was required to include in its bids to the United States an increase of up to twenty per cent over the regular price. This allegation was corrected in the amended complaint and was not essential to show the fraud relied upon. In any event, the amount by which Bausch & Lomb was, under the conspiracy, enabled to increase its prices to the United States obviously goes only to the question of the amount of damages.[6]

The affidavit first points out that Mr. Isseks in the course of the criminal proceedings stated for the Government that "there is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). This statement was of course accurate, because the charge in the indictment was not based on fraud. On the other hand, even if this statement be regarded as a conclusion by Mr. Isseks that respondents had not in fact defrauded the United States, it was merely his individual view of a question of civil liability beyond the scope of his duties and not before the court.

The affidavit alleges that "the 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by

---

[6]Whether the consideration for the agreement between the conspirators was the payment by Bausch & Lomb of all or part of the purported royalties or merely a reciprocal agreement for the exclusive right to sell to the named purchasers was equally immaterial on the question of fraud *vel non*.

Bausch & Lomb to the United States Government" (R. 27). This statement, of course, merely contradicts the provisions of the agreement itself which was specifically directed at the United States; it also is in conflict with the facts appearing in the bill of particulars (*supra*, pp. 4-8; and *infra*, pp. 32-33).

The affidavit asserts (R. 27-28) that "the price to be charged to the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone without the participation or consent of any other organization." This statement does not deny that Bausch & Lomb independently and alone, by virtue of the elimination of Zeiss from competition, was able to increase its price to a figure in excess of that which would have been bid in the presence of competition. Whether this excess was to be paid over to Zeiss or retained in toto by Bausch & Lomb was of course irrelevant so far as fraud and injury to the United States was concerned.

The next pertinent statement is that "at no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party" (R. 29). This statement falls far short of categorically negativing the making of "protective offers" by Zeiss. However, if so regarded, it is contradicted by the facts appearing in the bill of particulars (*supra*, p. 33 note 8).

The affiant closes with a sweeping conclusion of law (R. 29-30) that Bausch & Lomb at no time has submitted any claim upon the Government of the United States which was false, fictitious or fraudulent. The circuit court of appeals did not rely on the allegations of this or any other affidavit, and they afford no support for the judgment here. Since the issues in this case were raised by motion for summary judgment, and since the allegations of fact by the respon-

dents—if they may properly be regarded as even controverting the allegations essential to the charge of fraud contained in the amended complaint—are in any event clearly in conflict with the allegations of the complaint and the documents before the court, the affidavits cannot detract from the sufficiency of the facts pleaded by petitioners. *Weisser* v. *Mursam Shoe Corporation*, 127 F. 2d 344, 346.

Fraud on the facts pleaded.—The pleadings, set forth above, state several types of fraud under the uniform decisions of the federal courts. Separate and long adjudicated categories of fraud appear in the allegations that Bausch & Lomb (1) secured its competitor to refrain from bidding on government contracts, (2) procured its competitor to submit inflated bids, and (3) participated in the proceeds of the accepted and inflated bids of its competitor.

(1) Bausch & Lomb has committed a fraud by procuring its competitor to refrain from bidding on military orders for the United States. The original agreement between Bausch & Lomb and Zeiss provided that Zeiss should not sell military optical instruments "directly or indirectly to the United States" without the consent of Bausch & Lomb (R. 147). Though this agreement was later changed in form, the parties still agreed to "endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the military line" (R. 159) and the practice was continued (*supra*, p. 4-8).

Except that here the parties respondent are fewer and larger, the exclusion is precisely the same as that recently condemned as fraudulent, under the statute here involved, by the Circuit Court of Appeals for the Third Circuit and by this Court in *United States ex rel. Marcus* v. *Hess*, *supra*, p. 539. In public affairs at least, securing a party to refrain from bidding has long been recognized as an undoubted fraud. The authorities recognize that where the contractor thwarts the competitive bidding process by conspiracy,

there is no difference in the result to the public body whether the fraud is effectuated by colorable or complimentary bids made by other prospective bidders or by their mere failure to bid. In either case, the government is deprived of the benefits of competition which it would otherwise have had, and the fraud upon the public body as the result of the concealed joinder of interest is of equal vice. *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573, 576, 578 (1940); *Jennings County* v. *Verbarg*, 63 Ind. 107, 111; see *Swan* v. *Chorpenning*, 20 Cal. 182 (1862). As this Court said in *McMullen* v. *Hoffman*, 174 U. S. 639, 651:

> Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. * * * Public policy requires that officers of such [municipal] corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

Thus, when Zeiss, pursuant to the agreement, refrained from bidding and Bausch & Lomb so obtained government contracts, such contracts were obtained by fraud.

(2) Bausch & Lomb has committed a fraud by procuring its competitor to submit inflated bids or "protective offers" to the United States. Paragraph 3 of the agreement with Zeiss as implemented in 1925 provided that "in the case of inquiries * * * received * * * by Carl Zeiss from the authorities of the United States" it would inform Bausch & Lomb, be obligated to make "the protective offer named by" the latter up to 20% above normal prices, and if it secured the contract pay Bausch & Lomb "the excess price representing the protection" (R. 151-152). Though the

agreement was purged of this express provision, the practice continued (*supra*, p. 4-8). As in other collusive bidding cases, the reason for this arrangement was simply that, if competitors refused to bid, suspicion of collusion would be aroused so that deceptive and colorable bids were substituted as occasion required.

Here again, except that the parties are fewer but larger, the practice is precisely the same as that condemned, under the statute here involved, by the Circuit Court of Appeals for the Third Circuit and by this Court only recently in *United States ex rel. Marcus* v. *Hess, supra*, p. 539. By securing such inflated "protective" offers, Bausch & Lomb was enabled to secure higher compensation on its own bids. It was, in effect, a form of "puffing" long recognized as fraud by this Court. In *Veazie* v. *Williams*, 8 How. (49 U. S.) 134, there was involved the making of fictitious bids by an agent of the seller and this Court said (pp. 149-150, 153-154):

> The bill asked the rescission of a sale * * * on the alleged ground of imposition in the sale by means of puffing or by-bidding, so as to advance the price * * * The relief here * * * is sought for a fraud practiced in augmenting the price; or, in other words, for taking false steps to enhance it * * *
>
> A fraud was evidently perpetrated * * * By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud * * * The by-bidding deceives, and involves a falsehood, and is, therefore, bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest bidder, without puffing.

In *McMullen* v. *Hoffman*, 174 U. S. 639, 652-653, this Court dealt with collusive bidding as such:

> In this case there is more even than concealment. There is the active fraud in putting in of these, in substance, fictitious bids, in their different names, but in truth

> forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

No subsequent decision of this or any other federal court departs from the salutary principles thus laid down. For a statement of the similar rule in state courts see *Regan* v. *Babcock*, 188 Minn. 192, 200.

(3) Bausch & Lomb departed from the usual collusive bidding scheme by arranging to receive from Zeiss the "excess" or "protection" added by Zeiss to orders for the United States (R. 151-152, and pp. 4-8 *supra*). It is pleaded that Zeiss sold military optical instruments under this arrangement (R. 81-83, 188-192). Thus respondents have not only procured inflated bids to be made to the United States but, as undisclosed principals, have participated in the proceeds of such bids accepted by the United States. It was thus possible for Bausch & Lomb not only to "chill" the buyer by procuring Zeiss to make unduly high bids but, by its agreement, receive part of the price paid by the United States as to any such bids which might have been accepted nevertheless. It also increased the deceit, for it made it possible for Bausch & Lomb to submit even higher bids, permit Zeiss to receive the orders, and thus allay all suspicion while pocketing the "excess * * * protection."

Such collusive combining or sharing in the proceeds of collusive bids has long and uniformly been condemned as a fraud. This Court has held that, where two bidders on public contracts agree that the successful one will share in the proceeds of any contract received,

> The illegal character of the agreement is founded * * * upon the fact of the commission of a fraud by the parties in combining their interests and concealing the same, and in submitting different bids as if they were bona fide, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. (*McMullen* v. *Hoffman*, 174 U. S. 639, 649).

The same rule is applied in other federal courts with respect to both private and public contracts. *Pittsburgh D. & C. Co.* v. *Monongahela & W. D. Co.*, 139 Fed. 780; *In re Salmon*, 145 Fed. 649, aff'd 150 Fed. 279. Thus, by participating in the proceeds of the collusive bidding, respondents have committed a fraud.

II. SO LONG AS THE UNITED STATES IS CHEATED, UNDER THE STATUTE IT IS IMMATERIAL THAT RESPONDENTS HAVE NOT MADE AFFIRMATIVE MISREPRESENTATIONS; BUT, IN ANY EVENT, AFFIRMATIVE MISREPRESENTATIONS WERE MADE AND ARE HERE PLEADED.

The court below was apparently of the view that fraud meant deceit, that deceit meant the making of representations and that—since no representations on the subject were made affirmatively by Bausch & Lomb—there could therefore be no fraud. But the statute does not require that affirmative representations must be made before liability can attach, and the making of collusive bids as here alleged is in itself held to be sufficient representation to conform to the concept of fraud or deceit. Moreover, the object of the statute here involved is not to be thwarted by nice distinctions derived from the common law on fraudulent representations for, as this Court has said, the purpose

of the statute as explained in the Senate on its adoption "was to provide protection against those who would 'cheat the United States.' " *United States ex rel. Marcus* v. *Hess, supra*, p. 544.

The decision below.—The circuit court of appeals held that, under the statutes here involved, Bausch & Lomb was guilty of a "wrong" but not of fraud" (R. 268):

> Although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non* * * *
>
> The contracts between Bausch & Lomb and Carl Zeiss of Jena * * * unlawfully gave Bausch & Lomb an advantage * * *
>
> That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market.

In short, the court holds that the respondents must not only be guilty of fraud but must "at some stage of the negotiations" have denied being guilty. But there is nothing in the relevant clauses of the statute which requires any representation whatever. As set forth in Point I, *supra*, the uniform decisions of the federal courts require only that there shall have been a fraudulent plan and that, pursuant thereto, money shall have been secured or sought from the United States.

The court below may have been misled by failure to distinguish the several very different clauses in the statute. The first clause relates to the individual presentation of any "fraudulent" claim for "payment" by the United States. The third clause brings in those who do so by "agreement, combination, or conspiracy." It is under these clauses of R. S. §5438 that the present complaint is presented and they require no representations whatever but merely the seeking of "payment" from the United

States. In contrast, the second clause, here inapplicable, relates to "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition"; and this Court has recently distinguished it from the first and third clauses. *United States ex rel. Marcus* v. *Hess, supra,* p. 540 n. 2. Indeed, the very fact that Congress has seen fit to insert a special clause—the second—relating to misrepresentations in papers submitted by parties seeking payments from the United States emphasizes the omission of any requirement of representations, false or otherwise, under the first and third clauses.

The court below has made it quite apparent that it felt it a duty to view the statute with jaundiced eye. It erected a distinction between "wrong" and "fraud." It viewed the statute as "drastically penal", to be "strictly construed", and a perpetuation of a form of action "odious and happily nearly obsolete"; and it thus concluded that the proceeding here involved "is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 268-269).

This Court has recently rejected the similar decision in another circuit:

> We cannot accept either the interpretive approach or the actual decision of the court below. * * *
>
> Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. * * * We must give [the statute] the fair meaning of its intendment. (*United States ex rel. Marcus v. Hess, supra,* pp. 540-542.)

There, technical difficulties existed because municipal corporations were interposed between the United States and

the contractor-claimants. Here the contractor is in direct contact with the Government which he is charged with defrauding. In the *Hess* case the difficulty was in spelling out the presentation of any claim to the United States for payment, since the defendants had presented their claims for payment only to the intermediate municipalities and in fact had no legal claims upon the United States. It was therefore necessary for this Court to consider "the exact nature of respondents' relation to the government" of the United States and to show that the defendants had actually presented other papers and made representations to the United States or for the approval of officials of the United States. (*Id.* pp. 542-544). The instant case contains no such complication. Here there is a fraudulent scheme followed by collection of moneys from the United States directly.

Manifestly, the court below has wrongly interpreted the statute. It has gone far toward nullifying it, for it holds that there must not only be fraud or a "wrong" but that the accused must have been asked and must have deceitfully denied the particular type of fraud involved. It emasculates the first and third clauses of the statute, leaving only the second—and this despite the fact that the first and third clauses are broader and more likely to catch carefully planned fraudulent schemes. To the extent that deceitful representations may be required, moreover, they are here pleaded as set forth next below.

The representations pleaded.—Assuming that, before anyone can be held liable under R. S. §5438, he must not only have entered into a fraudulent scheme but must have made representations denying such scheme, the facts here pleaded amply demonstrate that respondents made such misrepresentations. Bausch & Lomb not only made such misrepresentations directly but also through its co-conspirator or agent Zeiss.

(1) The court below was of the opinion that respondents had made no misrepresentations to the United States (R. 268):

> A bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "reasonable", or "competitive." If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been [by criminal proceedings and antitrust injunctions], but not because by bidding he has said said anything about competition.

But that statement, assuming it to be proper as to unconcealed conditions, does not fit this case. *For here the bidder has himself carefully rigged the market and then submitted his bids knowing that he had eliminated all serious competition by his own act and had carefully concealed it from the government-buyer.* As this Court has said:

> The vice which is so frequently detected in contracts and agreements [in which parties combine or collude] lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source. (*Hyer* v. *Richmond Traction Company*, 168 U. S. 471, 477.)

So in *United States* v. *Amster*, 273 Fed. 532, 533, the court held that the significant element was the submission of bids

> under the guise of honest competition, coupled with the agreement of the person in charge of the bids to keep silent as to the falsity or fraudulent character of the bids themselves.

The court below has obviously failed to take into account the element and vice of secrecy in this case.

That every participant in a collusive bidding scheme commits a fraudulent act is the implicit and basic assumption of all the cases including the recent decision in *United States ex rel. Marcus* v. *Hess, supra,* p. 539 and n. 1. Every such participant thus submits a bid and, in the words of the statute, later submits claims for payment "knowing such * * * to be * * * fraudulent." This Court has, in so many words, held that a collusive bid is an affirmative misrepresentation:

> A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. * * * A committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount of the bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. (*McMullen* v. *Hoffman,* 174 U. S. 639, 647.)

The Court went on to say that collusive bidding, or rigged bidding, is "active fraud" and the bids so submitted "fictitious * * * forming no competitive bids" (pp. 652-653).[7] The court below, therefore, has not only ignored the facts but also the long-settled rule laid down by this Court.

---

[7]It has also been held that a collusive sale is a misrepresentation to the tax authorities, since government officers are entitled to take the sale itself as a "representation that the sale was made in good faith, and without any secret oral understanding between the parties." *Reinstine* v. *Rosenfield,* 111 F. 2d 892, 895.

(2) Not only has Bausch & Lomb directly made fraudulent representations by submitting collusive bids and then, after receiving contracts, submitting claims for payment with knowledge that it had secured the contracts or inflated the price through such fraud, but it is responsible for the misrepresentations it has caused Zeiss to make for the benefit of Bausch & Lomb. In civil, as well as in the criminal law, each member of the conspiracy is constituted the agent of all and every act and declaration in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249. This Court, moreover, has laid it down as a rule of agency in the case of bidding:

> The agent is bound to disclose all and to act as the principal is when present, and selling. * * * A principal so acting in person cannot be justified in asserting what is false, and by which another is injured. * * * What the vendor may not do in person, or may not employ others to do in his absence,—that is, make by-bids to enhance the price,—his agent * * * cannot rightfully do. *Veazie* v. *Williams*, 8 How. (49 U. S.) 134, 156-157.)

Whether Zeiss is regarded as a co-conspirator or simple agent, the result is the same in that Bausch & Lomb is responsible.

Here, pursuant to the arrangement between them, Zeiss either refrained from bidding or made colorable or "protective" and inflated bids at the instance of Bausch & Lomb. The elimination of Zeiss from competition for United States Government business was effectuated by the following terms of the agreement (R. 151-152, 153-154):

> Carl Zeiss obligates itself not to sell such [military] instruments, directly or indirectly, to the United States, excepting under the following conditions:

> In the case of inquiries, received * * * by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. * * * If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

It thus appears that the conspiracy contemplated that ordinarily Zeiss should make no offers or bids to the United States. However, arbitrary refusal by Zeiss to bid or quote prices on invitation might give rise to suspicion of a secret agreement between the companies. Hence it was provided that upon invitation to bid Zeiss should make a bid or offer, not bona fide, but at a higher figure named by Bausch & Lomb. Indeed, both the indictment and the complaint in equity alleged that on various occasions subsequent to June 27, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss (R. 98, 224).[8] It clearly appears that as late as March,

---

[8]The continuation of the unlawful agreement expressed in the 1925 modifications of the 1921 contract despite its elimination in form from the 1926 contract is also apparent from the instances cited in the Government's bill of particulars to show that Bausch & Lomb has continued to refuse to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales (R. 97, 131-132). (In 1935 Bausch & Lomb refused contracts with Great Britain and France for $1,500,000 worth of military optical instruments. See Borkin, Germany's Master Plan (1943), pp. 285-286.) It also appears from the bill of particulars that Bausch & Lomb has in other instances sold military optical instruments for use outside the United States

1928, long after the purported repudiation of the unlawful agreement, Zeiss, on inquiry from the United States naval attache in Germany, quoted a price on periscopes only after obtaining the consent of Bausch & Lomb to a figure which included ten per cent. payable to Bausch & Lomb (see Exhibit U, R. 188-192). It is, therefore, apparent that such of the facts as may be said to have been before the court by virtue of the references to the indictment and complaint

---

only after first obtaining the consent of Zeiss as to the sale and the price, the sale in each case being made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon with Zeiss (R. 97, 133-136). Exhibits G and H. (R. 162-167) referred to in the bill of particulars at R. 134 translate as follows:

Exhibit G: "The Argentine Naval Commission of this place is interested in buying from one to six altitude meters of 4 meter (base) in accordance with U. S. army specifications, depending on the number they will buy. We intend to ask from $26,000 to $22,000 per piece. Please cable if you are in agreement with this."

Exhibit H: "As an exception, we agree to the offer at the price mentioned."

Exhibit G1: "Russia invites offer for altitude meter of 4 meter (base). We propose to offer one instrument at $25,000; 3 instruments at $24,000 each. Cable whether agree."

Exhibit H1: "We agree to the prices of the 4 meter altitude meters for Russia."

The absence in this correspondence of any reference to the amount of the increase payable over to Zeiss on these sales may be explained by the fact that the supplemental contracts of 1925 state: "The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%" (R. 152, 154). "Normal price" apparently was "the normal price fixed by the firm of Carl Zeiss" (R. 155). The amount of the arbitrary loading of prices in these transactions, therefore, was probably determinable by reference to normal price lists fixed by Carl Zeiss.

show conclusively that Zeiss made bids to the United States in furtherance of the conspiracy with Bausch & Lomb. Since these bids were intended to be, and obviously were, misrepresentations in furtherance of the conspiracy, they are chargeable to respondent Bausch & Lomb.

When Zeiss submitted bids, they were of course false and fraudulent in that they were made on behalf of an undisclosed party, Bausch & Lomb. But the fraudulent effect went deeper than the mere deceit as to the undisclosed principal or unjust enrichment as to the super-charge. The "protective" and inflated offers of Zeiss had two results: (a) They made it appear that the lower Bausch & Lomb bids were fair and reasonable both in individual cases and over the years and (b) they were plain representations that Zeiss was unable for economic reasons to compete in sales of military instruments to the United States. When Zeiss failed to bid at all, by its inaction the second of these was similarly brought home to the contracting officers of the Government of the United States. Each of these falls within recognized categories of fraud and misrepresentation:

(a) Whenever, upon inquiry, Zeiss made a bid or quoted a price to the United States, such bid was not bona fide but colorable only. There was in this a clearly fraudulent misrepresentation in that the contracting officers of the United States were left with the impression that the amount of the bid submitted by Zeiss represented that company's judgment that the sum so named was not unreasonable. Bausch & Lomb could then safely submit high bids, so long as they were below the inflated "protective" offers of Zeiss; and the complaint here alleges that bids by Bausch & Lomb "were at prices that pretended to be and were represented to be, and which the government of the United States and its authorized representatives believed to be the normal, prevailing and competitive prices" (R. 82). The fraudulent misrepresentation and effect in inducing the belief that the bids of Bausch & Lomb were not unreasonably high is

obvious and well-recognized. *McMullen* v. *Hoffman, supra,* p. 647; *United States ex rel. Marcus* v. *Hess, supra,* pp. 542 *et seq.; In re Salmon, supra,* 145 Fed. at 652; see *Hyer* v. *Richmond Traction Company, supra,* p. 477. The holding of the court below that there is no allegation of fraudulent misrepresentation by Bausch & Lomb is therefore in conflict with these decisions.

(b) Zeiss was not merely bound negatively to refrain from selling to the United States. Here it was part of the design and plan that the illegal arrangement be affirmatively concealed from the United States by protective bids and, if pressed, by what would amount to protective sales. In furtherance of the expressed purpose of concealment (R. 149), the bids submitted by Zeiss upon inquiries from the United States amounted to representations not only that they were bona fide but, because under the conspiracy they were required to be up to twenty per cent higher than the normal price, they also amounted to a series of continuing misrepresentations that in truth, in the sale of military instruments in the United States, Zeiss was unable to compete with Bausch & Lomb. The natural and intended tendency then was to suppress the truth and avoid investigations by United States officials which might have earlier disclosed the illegal conspiracy. By the uniformly higher Zeiss bids submitted over a long period of time, the Government officials were thus led to assume that in instances where Zeiss failed to submit a bid it was not because of conspiracy but because of inability to quote competitive prices through economic reasons.

The tendency of this misrepresentation to mislead, through what might be called a course of conduct, was plainly vicious in that it also indicated that the Bausch & Lomb bids were probably fair and reasonable:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepre-

> sentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction. (3 Restatement, Torts, sec. 535).

Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. *Copper Process Co.* v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66, 73; Benjamin, Sales (7th ed.) p. 462.

> The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. (*Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 388.)

It is, therefore, submitted that within the meaning of R. S. §5438 Bausch & Lomb has made misrepresentations through Carl Zeiss which at least aided in concealing the existence of the combination and in preserving a non-competitive market for Bausch & Lomb. *Tooker* v. *Alston*, 159 Fed. 599, 603.

Conclusion.

The question here involved is not merely of interest to the litigants, but of general importance. It is respectfully submitted that the decision below should be reversed.

HOMER CUMMINGS,
WILLIAM STANLEY,
Counsel for Petitioners.

September, 1943.

APPENDIX.

REVISED STATUTES.

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

INDEX

Page

1. The judgments below were not rendered for lack of any issue of fact appearing upon the affidavits but upon the face of the allegations of the complaint alone, and therefore the question here is so limited 2
2. Summary judgment could not properly be entered for respondents upon the affidavits filed herein 5

Conclusion 11

CITATIONS

CASES

Affiliated Enterprises v. *Courter Amusement Co.*, 32 F. Supp. 11 11
Campana Corporation v. *Harrison*, 135 F. 2d 334 5
Chemical Foundation Inc. v. *Universal-Cyclops Steel Corp.*, 5 Fed. Rules Serv. 56c.41, Case 7 5
Farley v. *Abbetmeier*, 114 F. 2d 569 4
Fletcher v. *Evening Star*, 114 F. 2d 582, cert. denied 312 U. S. 694; and 133 F. 2d 395 7
Fox v. *Johnson & Wimsatt, Inc.*, 127 F. 2d 729 11
Hooven etc. Co. v. *Royal Indemnity Co.*, 4 Fed. Rules Serv. 56a.3, Case 1 6
Irving Trust Co. v. *McKeever*, 5 Fed. Rules Serv. 56c.41, Case 2 11
Johnson v. *Johnson & Co., Inc.*, 6 Fed. Rules Serv. 12e.22, Case 1 4
Johnson-Crews Co. v. *United States*, 38 F. Supp. 544 6
Merchants Distilling Corp. v. *American B. Corp.*, 33 F. Supp. 304 11
Nickelson v. *Nestles Milk Products Corporation*, 107 F. 2d 17 6
Person v. *United States*, 112 F. 2d 1 4
Port of Palm Beach Dist. v. *Goethals*, 104 F. 2d 706 11
Ramsouer v. *Midland Valley R. Co.*, 44 F. Supp. 523 ..... 5, 6
Ramsouer v. *Midland Valley R. Co.*, 135 F. 2d 101 ..... 5, 6
Shultz v. *Manufacturers & Traders Trust Co.*, 32 F. Supp. 120 10
Shultz v. *Manufacturers & Traders Trust Co.*, 3 Fed. Rules Serv. 56c.41, Case 11 10
Standard Rolling Mills, Inc. v. *National Mineral Co.*, 5 Fed. Rules Serv. 56c.41, Case 5 6
Tobelman v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 6
United States v. *Newbury Mfg. Co.*, 4 Fed. Rules Serv. 56c.41, Case 15 5
Whitaker v. *Coleman*, 115 F. 2d 305 11

STATUTES AND MISCELLANEOUS

Federal Rules of Civil Procedure:
- Rule 6 (d) 9
- Rule 11 9
- Rule 12 ..... 2, 3, 11
- Rule 56 ..... 1, 4, 5, 7, 11
- Rule 56 (c) 9

Proceedings, American Bar Association Institute, Cleveland, 1938, p. 225 10
Revised Statutes, Sec. 1 2
United States Code, Title 1, Sec. 1 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 21

UNITED STATES OF AMERICA, Ex Rel. MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER on Their Own Behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

Respondents, in their brief, seek to avoid the issue of law presented by this case on the theory that the judgment under review was a judgment rendered upon affidavits pursuant to Rule 56, that the affidavits of petitioners do not controvert the affidavits of respondents in any material

respect, and that therefore the judgment below is to be sustained solely because there was no issue whatever before the trial court upon which trial should be had. On that ground, respondents take the position that it is "unnecessary to consider" the leading authorities presented in support of the petition (Resp. Br. p. 29). This reply is limited solely to the question whether the judgments below were rendered upon affidavits pursuant to Rule 56 and whether they could properly be so rendered.[1]

1. The Judgments Below Were Not Rendered For Lack of Any Issue of Fact Appearing Upon the Affidavits But Upon the Face of the Allegations of the Complaint Alone, and Therefore the Question Here Is So Limited.

The record clearly demonstrates that respondents here sought and secured a judgment upon the pleadings. Rule 12 provides for dismissal of a complaint on motion for "failure to state a claim upon which relief can be granted." Such relief was sought by the original order to show cause

---

[1]The brief for Carl Zeiss, Inc., takes the position that no cause of action is stated against it because Zeiss never did business with the United States Government; but the simple answer is that Zeiss, as one of the co-conspirators, is answerable for the acts of Bausch & Lomb and of Zeiss of Jena. For authorities upon this familiar rule of law, see petitioners' main brief, p. 31.

Carl Zeiss, Inc., also takes the position that an action under the statute here involved cannot be maintained against a corporation since the statute refers only to "persons". The short answer is that Section 1 of both the Revised Statutes and the United States Code provides that "the word 'person' may extend and be applied to * * * corporations."

This reply brief will treat primarily with the position of the Bausch & Lomb respondents, since Zeiss, as a co-conspirator, is liable if Bausch & Lomb is liable.

(R. 12), the attached affidavit of counsel (R. 13-14), the attached affidavit of the president of Bausch & Lomb (R. 17-18, 22), the notice of motion (R. 39-40), the affidavit of the president of Zeiss (R. 41), the second and amended order to show cause upon which the trial court's judgment was entered (R. 46-47), and the second affidavit of counsel (R. 49, 51). Counsel for both Bausch & Lomb and Zeiss, Inc., specifically referred to Rule 12 (R. 14, 39).

The original order to show cause asked that the original complaint be dismissed, in the language of Rule 12, "on the ground that the complaint fails to state a claim" (R. 12). Grounds 2 (a) and (b) of the second order to show cause, obtained by Bausch & Lomb and upon which the judgment of the trial court was entered, asked that the court determine that the "amended complaint * * * is a nullity" and also deny leave to file it (R. 46-47); and the similar order obtained by Zeiss made the same requests (R. 58-59). Indeed, summary judgment procedure was sought by Bausch & Lomb, as set forth in the affidavit of counsel, "in the alternative, but only in the event that grounds 2 (a) and (b) of this motion are denied" (R. 52).

The trial court thereupon held that "the proposed amended *complaint* of the plaintiffs herein is a nullity," denied leave to amend the complaint "on the ground that the * * * proposed amended *complaint* does not state a cause of action" (R. 258), entered its order "that the *complaint* herein be and it hereby is dismissed," and accordingly entered judgment with costs (R. 261). The Circuit Court of Appeals so treated the judgment, stating that the trial judge "did indeed deny leave to amend on the ground that the second *complaint* did not state a cause of action" (R. 269) and addressed its opinion to the issue of law as to whether affirmative representations are necessary to constitute fraud under the statute. The emphasis supplied in the foregoing quotations indicates clearly that both courts were addressing their remarks to the "com-

plaint" and not to affidavits. Anyone familiar with summary judgment procedure under Rule 56 and the decisions thereon may see at a glance that these decisions were not rendered upon a comparison of opposing affidavits and a finding that no relevant issue of fact remained.

It is true that, in addition to its order denying leave to file the amended complaint, the trial court also entered "summary judgment" (R. 261); and the Circuit Court of Appeals found the instant action "precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 269). But these references to "summary judgment" do not mean that the judgment was entered upon the affidavits, for "summary judgment" is a phrase of many meanings and includes judgment entered upon the pleadings alone. Rule 56 itself specifically authorizes summary judgment "if the pleadings * * * show * * * that the moving party is entitled to a judgment as a matter of law." Hence, summary judgments are granted for insufficiency of the complaint or answer. Where the issue is "clearly and exclusively one of law" showing insufficiency of the claim, "the pleadings not only permitted but required that judgment be entered upon them without further proceedings." *Farley* v. *Abbetmeier*, 114 F. 2d 569, 574 (U. S. App. D. C., 1940). Summary judgment will be entered where the answer does not state a defense. *Person* v. *United States*, 112 F. 2d 1 (C. C. A. 8, 1940). "Where a defendant thinks he is entitled under the Federal Rules of Civil Procedure to a judgment *either* on the pleadings *or* on the basis of extrinsic facts established by affidavits, depositions or stipulations, he may at any time move with or without supporting affidavits for a summary judgment in his favor." *Johnson* v. *Johnson & Co., Inc.*, 6 Fed. Rules Serv. 12e.22, Case 1 (N. D. Ga., 1942), emphasis supplied.

Manifestly, both courts below used the phrase "summary judgment" with reference to judgment on the pleadings. Accordingly, respondents' attempt now to argue

their right to relief upon the affidavits under Rule 56 is in effect a request that this Court both (1) do what the courts below declined to do and (2) undertake to determine issues not passed upon below.

2. Summary Judgment Could Not Properly Be Entered For Respondents Upon the Affidavits Filed Herein.

Where the right to such judgment is determined upon affidavits, summary judgment is properly entered only if, in the words of Rule 56, the affidavits "show that * * * there is no genuine issue as to any material fact." Throughout their brief respondents speak of "evidence", as though summary judgment were a trial by affidavit. But Rule 56 "does not compel a party to try his case on affidavits." *United States* v. *Newbury Mfg. Co.*, 4 Fed. Rules Serv. 56c.41, Case 15 (Mass., 1941); *Chemical Foundation Inc.* v. *Universal-Cyclops Steel Corp.*, 5 Fed. Rules Serv. 56c.41, Case 7 (W. D. Pa., 1942). On motion for summary judgment "the court is not authorized to decide an issue of fact, but is to determine whether the pleadings and record before the court creates an issue of fact to be tried." *Ramsouer* v. *Midland Valley R. Co.*, 44 F. Supp. 523, 526 (W. D. Ark., 1942). "The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings." *Campana Corporation* v. *Harrison*, 135 F. 2d 334, 335-336 (C. C. A. 7, 1943). And the rule obtains even where the entire record in a previous trial is presented on the motion. *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101, 103 (C. C. A. 8, 1943).

Aside from the general issue of law, discussed by the court below and treated in petitioners' main brief, the only issue there could be here is whether respondents by their affidavits have, in the language of Rule 56, demonstrated that "there is no genuine issue as to any material fact." Respondents have filed no answers, a state of the record upon which some courts refuse to examine affidavits.

Nickelson v. *Nestles Milk Products Corporation*, 107 F. 2d 17, 19 (C. C. A. 5, 1939); *Hooven etc. Co.* v. *Royal Indemnity Co.*, 4 Fed. Rules Serv. 56a.3, Case 1. (S. D. Ohio, 1940); *Johnson-Crews Co.* v. *United States*, 38 F. Supp. 544 (E. D. S. C., 1941). The burden is on the movant of showing that there is no issue as to any material fact. *Standard Rolling Mills, Inc.* v. *National Mineral Co.*, 5 Fed. Rules Serv. 56c.41, Case 5 (E. D. N. Y., 1942); *Ramsouer* v. *Midland Valley R. Co.*, 44 F. Supp. 523, 527 (W. D. Ark., 1942). "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *Tobelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1018 (C. C. A. 3, 1942). "The court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101, 106 (C. C. A. 8, 1943).

The affidavits upon which respondents here rely were addressed to the original complaint and not to the amended complaint, counsel for both Bausch & Lomb and Zeiss, Inc., merely filing further affidavits asking that the amended complaint be considered upon their original motions (R. 49, 60). Moreover, the only affidavit which purports to state material facts is that of the president of Bausch & Lomb (R. 17-31), to which other affidavits for respondents merely refer (R. 32, 33); and it is to be noted that this affiant is the person who executed the original collusive agreement involved herein (R. 120).

For the following several reasons, no court could properly render summary judgment on the record here:

(1)

Respondents were attempting to secure a summary judgment by judicial notice of the records in the prior govern-

ment proceedings[2]—as appears by the introductory statement in the affidavit of the president of Bausch & Lomb that the complaint is "in direct contradiction of facts which this Court may notice in the files of the Court" (R. 22-23), by the similar affidavit of the president of Zeiss to the effect that "practically all" of the allegations of the complaint "are directly contrary to facts which this Court may take cognizance of as they are in the files of this court" (R. 41), and by the statements of both presidents in their affidavits that the records in the government proceedings could be deemed incorporated in their affidavits (R. 24, 26, 42, 44). Since respondents have thus chosen to rely upon the records in the government proceedings, they are in no position to complain because the petitioners thereafter did likewise (R. 65, 86, 112, 194, 145, 151, 153, 157, 212, 243) and they are in no position to maintain as they do that such incorporation by reference is improper under Rule 56 (Resp. Br., pp. 19 *et seq.*). Moreover, by their wholesale reference to those records they make it doubly proper for petitioners to show, as it is done throughout petitioners' main brief, that the records in the government cases support and confirm the fraud pleaded in the complaint.

(2)

Secondly, the affidavit of Eisenhart, president of Bausch & Lomb, does not set forth facts but is composed, in addition to the references to the prior government proceedings, only of arguments of law and of general or equivocal denials as set forth on pages 18 to 21 of peti-

[2]Summary judgment may, of course, be entered upon judicial notice of facts precluding recovery. *Fletcher* v. *Evening Star*, 114 F. 2d 582, cert. denied 312 U. S. 694; and 133 F. 2d 395 (U. S. App. D. C., 1942).

tioners' main brief. He states that the earlier agreements were "in terms revoked" (R. 27), which is in contradiction of the facts appearing in the government bill of particulars (Pet. Br., pp. 4-8, 32-33), and is immaterial in any event because the formal revocation of the agreements falls far short of cessation of the fraudulent practice charged. He asserts Bausch & Lomb "alone" fixed the prices of military optical instruments sold to the United States government (R. 27-28), which is of course no denial that Bausch & Lomb had placed itself in a position to fix and maintain arbitrary, artificial, and unreasonably high prices by its elimination of Zeiss of Jena from the field. He denies that "the 20% bid provision of the 1925 agreement" was ever invoked (R. 29), which does not deny that such an arrangement was later used as charged or that Zeiss made the "protective offers" charged, and which is contradicted by the facts appearing in the government's bill of particulars (Pet. Br., p. 33, note 8). Finally, he "categorically" denies that respondents "presented for payment * * * bills * * * and accounts against the United States knowing that such documents were excessive, false, fictitious and fraudulent" (R. 29-30), which is not a denial that bills and accounts were presented but is merely a denial that they were "fraudulent" and is hence no statement of fact but merely a disavowal of the ultimate conclusion of law to be established upon a trial of the case. No other relevant facts are stated by Eisenhart or any other respondent, or by anyone on behalf of the respondents.

The affidavits for respondents, therefore, do not in themselves raise any material issue of fact for petitioners to controvert and, consequently, present no ground for summary judgment upon affidavits. The responsive affidavits for petitioners, therefore, quite properly replied in kind. Aside from the arguments of law in reply to the

arguments of law in respondents' affidavits,[3] petitioners' affidavits enumerate the changes made by the amended complaint (R. 72-73) and, as the respondents had previously done, refer to the records in the previous government cases (R. 64-65, and see note 2 at page 9 of petitioners' main brief).

Upon this state of the record, and upon these opposing affidavits, the courts below were in no position to do more than pass upon the sufficiency of the allegations appearing upon the face of the complaint, which they did.

(3)

Moreover, petitioners ~~respondents~~ were not accorded a fair opportunity to present their case by affidavits. The order to show cause, upon which the judgment here involved was entered, was served on January 14 and returnable two days later, on January 16, 1942. Rule 56 (c), however, specifically provides that "the motion shall be served at least 10 days before the time specified for the hearing." Petitioners duly objected (R. 67) without avail, so that the hearing was held in direct violation of both the rule quoted above respecting summary judgments and Rule 6 (d) as to motions generally. In addition, the order to show cause "stayed" plaintiffs "from taking any further proceedings in this action" (R. 48) and thus precluded them from the exercise of their rights to pre-trial examination, discovery, and inspection under the Rules of Civil Procedure to which they directed the attention of the trial court (R. 67). It

[3]These arguments were addressed to respondents' assertion that petitioners were subject to disciplinary action under Rule 11 for irresponsible statements (R. 65), to showing their right to file the amended complaint (R. 66), to petitioners' right to ten days' notice prior to summary judgment hearing (R. 67-68), to respondent Zeiss' contention that it was not a party to the fraud (R. 68-72, 74), and to the contention that the government had disavowed the existence of fraud (R. 73-74).

may indeed be conceded that the proceeding was "summary," but at the same time it was in direct violation of the mandatory requirements of the Rules of Civil Procedure and hence unlawful. Particularly since fraud was an issue and cross-examination desirable, the court should at least have deferred action so that the complaining party might take depositions. *Shultz* v. *Manufacturers & Traders Trust Co.*, 32 F. Supp. 120, 121 (W. D. N. Y., 1940).

(4)

Finally, it may be noted that this is not the kind of case for which summary judgment procedure is designed. Dean Charles E. Clark (who, as respondents state at page 15 of their brief, "sat below and acted as Reporter for the Revisers of the Federal Rules") stated at the Cleveland Institute on the new rules that

> The great question about the motion for summary judgment is whether it may not be attempted in all sorts of cases, whereas it is only really going to perform its function in the simple case where there isn't much of a defense. (Proceedings, American Bar Association Institute, Cleveland, 1938, p. 225.)

This, of course, is no "simple case". The international scope and subtle operation of the fraud here pleaded do not lend themselves to affidavit procedure, which is perhaps the reason why respondents themselves filed affidavits which were either general denials or argumentative. That almost any cause of action for fraud once stated in a pleading is not thereafter susceptible to summary judgment on affidavits has been the experience of several courts. "Summary judgment * * * was not intended to function" in a case based on "a complex and intricate scheme of fraud" because such cases "are entirely too involved to be disposed of in such a summary manner." *Shultz* v. *Manufacturers & Traders Trust Co.*, 3 Fed. Rules Serv. 56c.41, Case 11 (W. D. N. Y., 1940). An issue of "false representations * * * can only be determined by the testimony of

witnesses upon final hearing." *Merchants Distilling Corp.* v. *American B. Corp.*, 33 F. Supp. 304, 306 (Del., 1940). Here the essential finding of fraud is for the jury, and hence summary judgment on affidavits should not be permitted "unless it is quite clear what the truth is." *Port of Palm Beach Dist.* v. *Goethals*, 104 F. 2d 706, 709 (C. C. A. 5, 1939); and see *Affiliated Enterprises* v. *Courter Amusement Co.*, 32 F. Supp. 11, 13 (E. D. N. Y., 1940). Where the issue is not only one for a jury but involves the credibility of witnesses, the case is doubly one for trial rather than summary judgment. *Whitaker* v. *Coleman*, 115 F. 2d 305 (C. C. A. 5, 1940). Only where the ultimate conclusions in dispute are for a court rather than a jury may the court grant summary judgment. *Fox* v. *Johnson & Wimsatt, Inc.*, 127 F. 2d 729, 737 (U. S. App. D. C., 1942). Where the dispute is as to what agreement, partly oral, there was between the parties, summary judgment is improper. *Irving Trust Co.* v. *McKeever*, 5 Fed. Rules Serv. 56c.41, Case 2 (E. D. N. Y.).

Conclusion.

It is respectfully submitted that (1) fraud under the statute here involved is sufficiently alleged on the face of the amended complaint; (2) both courts below treated the case as one arising solely upon the face of the complaint pursuant to Rule 12 and, in their conclusions thereon, erroneously found no fraud stated; and (3) even treating the proceeding now as one upon affidavits filed pursuant to Rule 56, respondents have not demonstrated the required lack of any issue of fact and the issues in the case are not of the type adaptable to affidavit procedure.

HOMER CUMMINGS,
WILLIAM STANLEY,
Counsel for Petitioners.

October, 1943.

FILE COPY

Office - Supreme Court, U. S.
MAR 17 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA, Ex Rel. MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION SUBMITTED ON BEHALF OF CARL ZEISS, INC.

RAYMOND M. WHITE,
Counsel for CARL ZEISS, INC.,
One Wall Street,
New York, N. Y.

INDEX

	PAGE
OPINIONS	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
ARGUMENT	9
Petitioners have shown no reason why a writ of certiorari should not be granted	9
I. THE CASE WAS DECIDED BY THE COURTS BELOW IN ACCORDANCE WITH THE ESTABLISHED LAW	9
II. THAT THE COURTS HAVE CONSISTENTLY REFUSED TO ENTERTAIN ACTIONS WHERE THE FRAUD WAS NOT SUCH AS DEFINED IN THE STATUTES	11
III. AN ACTION UNDER THIS STATUTE CANNOT BE MAINTAINED AGAINST A CORPORATION	11
CONCLUSION	12
APPENDIX	13

TABLE OF CASES

	PAGE
Mandel v. *Cooper Corporation*, 42 F. Supp. 317	11
Olson v. *Mellon*, 4 F. Supp. 947; affd. 71 F. (2d) 1021; cert. den. 293 U. S. 615	11
United States v. *Cohen*, 270 U. S. 339	9, 10
United States v. *Kansas Pac. Ry. Co., et al.*, (1877) Fed. case #15506	11
United States ex rel. Kessler v. *Mercur Corporation et al.*, 13 F. Supp. 742; Affd. 83 F. (2d) 178; cert. den. 299 U. S. 576	9, 10
United States ex rel. Marcus v. *Hess*, 41 F. Supp. 197; Rev. 127 F. (2d) 233; Rev. U. S. Supreme Court (87 L. Ed. 374)	10
United States v. *McMurtry*, 5 F. Supp. 515	11
United States v. *Miskell*, 15 Fed. 369	11
United States v. *New Orleans Chapter*, 127 F. (2d) 649	10

STATUTES

Informer Statute, Revised Statutes, Sections 3490, 3491, 3492, 3493 and 5438. (31 U. S. C. 231-235 inclusive)	2, 3, 7, 11
Sherman Anti-Trust Act, Act of July 2, 1890, Ch. 647, Sec. 1; 26 Stat. 209. (16 U. S. C. Sec. 1)	4
Criminal Code (18 U. S. C. Sec. 18)	10
Rules of Civil Procedure, Rules 12(a) & 56	5, 6

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 761

United States of America, Ex Rel. Murray Brensilber, and Emanuel Thebner, and Murray Brensilber and Emauel Thebner, on Their Own Behalf,

Petitioners,

v.

Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI SUBMITTED ON BEHALF OF CARL ZEISS, INC.

Opinions Below

There was no opinion by the District Court.

The unanimous opinion of the Circuit Court of Appeals for the Second Circuit per curiam affirming the orders of the District Court dismissing the proceeding was handed down on November 5, 1942, and is reported in 131 F. 2d, 545.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on November 23, 1942. Petitioner invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

(1) Whether a violation of the Anti-Trust laws, allegedly antecedent to the execution of a contract with the Government, is a claim false, fictitious and fraudulent within the meaning of the Informer Act, Sections 3490-3494, 5438 of the United States Revised Statutes (USC Title 31, Secs. 231-235).

(2) Whether the Informer Act, R. S., Sections 3490-3494, 5438 (USC Title 31, Secs. 231-235) imposes liability on an alleged party to a conspiracy to violate the Anti-Trust Act, who never at any time, pursuant to the conspiracy or otherwise, had any dealings with the Government or any officer thereof.

(3) Whether an action can be maintained under the Informer Act, R. S. 3490-3494, 5438 (USC Title 31, Secs. 231-234) against a corporation for damages for not dealing in material which the Government might wish to purchase.

Statutes Involved

The action is brought under Revised Statutes, Sections 3490-3494, inclusive, (Complaint, Paragraph Seventeenth, R. 9, Amended Complaint, Paragraph Eighteenth, R. 84).

Sections 3490-3493, inclusive (31 USC, Sections 231-234) are given in the appendix infra.

Sec. 3490 of the Revised Statutes above referred to refers to Sec. 5438 of the Revised Statutes of February 18, 1878.

Sec. 5438 of the Revised Statutes of February 18, 1878 superseded ch. 67 of March 2, 1863 (12 Stat. p. 696).

By ch. 235 of the Laws of 1908 (35 Stat., p. 555) Sec. 5438 of the Revised Statutes was amended, a copy is given in the appendix infra.

Statement

This action, which was brought in December of 1941, followed the disposal of an indictment brought in the United States District Court for the Southern District of New York by the Department of Justice against Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch, Theodore B. Drescher and Carl Zeiss of Jena, Germany, (R. 87-109*) for a violation of the Anti-Trust laws on the ground that Bausch & Lomb Optical Company and Carl Zeiss of Jena entered into an agreement on April 28, 1921, Ex. A & B, R. 145-150, and supplemental agreements dated June 27, 1925, October 28, 1925, and November 26, 1926; Exhibits C, D & F, R. 151, 153 and 157, respectively whereby Bausch & Lomb Optical Company obligated itself not to sell optical instruments outside the United States of America and Carl Zeiss of Jena obligated itself not to sell military optical instruments to the United States (R. 95).

Carl Zeiss, Inc., which was incorporated under the laws of New York in 1925 (R. 42), never at any time dealt

---

* All references are to pages in the Transcript of record.

in or was concerned with military optical instruments (R. 43). Its exclusive business was selling cameras, telescopes, microscopes and optical instruments for civilian purposes (R. 43). It was made a defendant to the indictment on the ground that it was a subsidiary of Carl Zeiss of Jena and had refused to sell military optical instruments in the United States (Indictment R. 99, Bill of Particulars R. 204).

On March 5, 1941, the District Court accepted the plea of nolo contendere and imposed a fine of $1,000. on Carl Zeiss, Inc., which was paid (R. 42). All the defendants named in the indictment are made parties to this action except Carl Zeiss, of Jena (R. 87, 89).

The original complaint which was served (R. 60) on December 31, 1941, (R. 3-10), after alleging a violation of the Sherman Anti-Trust Act (USC Title 15, Sec. 1) and the sale of military optical instruments to the United States Government by all the defendants (R. 6, 7) alleged that such acts violated the Informer Act (R. 9) and asked for double damages against all the defendants in the sum of forty million dollars (R. 10).

Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher by their attorneys by order to show cause dated January 6, 1942, returnable January 16, 1942, asked for an order dismissing the complaint on the ground:

(a) Of improper venue.

(b) That the complaint did not state a cause of action and directing summary judgment on the ground that the complaint and affidavits showed that there was no general issue therein (R. 11, 12).

At the same time a motion was made on behalf of Carl Zeiss, Inc., for a judgment dismissing the complaint under Rule 12(a) of the Rules of Civil Procedure because the complaint failed to state a cause of action and for a summary judgment under Rule 56 on the ground that the complaint and affidavits showed there was no general issue as to any material fact (R. 39).

Not only did the original complaint fail to state a cause of action under the Informer Statute against any of the defendants but the indictment and the bills of particulars filed in the Clerk's office in the District Court of the Southern District of New York showed that petitioners deliberately charged in their complaint matters contrary to the facts shown in the indictment and bills of particulars. The following allegations relating to Carl Zeiss, Inc., were false:

(a) That the officers of Bausch & Lomb Optical Company were officers of Carl Zeiss, Inc., (original complaint, para. "FIFTH", R. 4);

(b) That Carl Zeiss, Inc., manufactured and sold "military optical instruments" (complaint, para. "SIXTH", R. 4);

(c) That Carl Zeiss, Inc., was a party to the conspiracy between Carl Zeiss of Jena and Bausch & Lomb Optical Company (complaint, para. "EIGHTH", R. 5).

(d) That Carl Zeiss, Inc., sold military optical instruments to the United States Government (complaint, para. "TENTH" and "ELEVENTH", R. 6, 7).

(e) That Carl Zeiss, Inc., presented bills for military optical instruments to the United States Government (complaint, para. "TWELFTH", R. 8).

(f) That Carl Zeiss, Inc., was paid by the United States Government for the military optical instruments sold by Carl Zeiss, Inc., to it (complaint, para. "FOURTEENTH", R. 8, 9).

The motion of Carl Zeiss, Inc. to dismiss, dated January 6, 1942, was supported by the affidavit of Karl A. Bauer (R. 41, 45), pointing out the defects. The motion was made returnable January 16, 1942. On January 13, 1942, (R. 61) petitioners served what purports to be an amended complaint (R. 78-85). Immediately an order to show cause, returnable January 16, 1942, was procured by Carl Zeiss, Inc. asking for an order striking out the amended complaint as sham and false; denying leave to plaintiffs to serve it and in the alternative dismissing it under Rule 12 as not stating a cause of action and for summary judgment under Rule 56 on the ground that it raised no genuine issue (R. 57-59). In this Carl Zeiss, Inc., followed the procedure of the other defendants (R. 46-56). To all motions petitioners submitted two affidavits in opposition (R. 64-77).

The amended complaint so far as it related to Carl Zeiss, Inc., left out the allegations in the original complaint which the indictment and Mr. Bauer's affidavit showed were false. There was left in the complaint:

(a) That Carl Zeiss, Inc., was a New York corporation doing business in New York (para. "FOURTH", R. 78, 79).

(b) That it is dominated, controlled and operated by Carl Zeiss of Jena (para. "SIXTH", R. 79).

(c) That Carl Zeiss of Jena carried on business in New York through Carl Zeiss, Inc. (para. "SEVENTH", R. 79).

(d) A general allegation that Carl Zeiss, Inc., was after its incorporation engaged in the conspiracy with Carl Zeiss of Jena and Bausch & Lomb Optical Company to fix territorial limits and control prices (para. "ELEVENTH", R. 80, 81).

(e) That it refused to sell military optical instruments in the United States (para. "TWELFTH", R. 81).

(f) That it "aided and abetted" and participated in the alleged matters (para. "SIXTEENTH", R. 83).

It left out of paragraphs "THIRTEENTH" and "FOURTEENTH" all charges against Carl Zeiss, Inc., as to the sale and delivery of military optical instruments and all charges as to bids and contracts with the Government of the United States (R. 81, 83). It expressly excepted Carl Zeiss, Inc., from the charge in paragraphs "FIFTEENTH" and "SEVENTEENTH" which alleged the presentment of bills to the United States Government and the receipt of money from the Government (R. 83, 84). Accordingly, there is nothing in the amended complaint sustaining the charge in paragraph "SIXTEENTH" thereof (R. 9). That the "aforesaid agreements, acts and conducts" by the defendant Carl Zeiss, Inc., violated Sec. 3490-3494 (U. S. C. 231-235).

The order of the District Court decrees this amended complaint to be a nullity and denies petitioners application to serve the proposed amended complaint (R. 254-258).

The order also dismisses the original complaint, granting summary judgment to the defendants as asked for (R. 261).

The statement in the opinion of the Circuit Court of Appeals on this case, 131 F. 2d 545, at p. 547; i. e.:—

> "The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud."

seems particularly applicable when such pleadings are offered.

To the equitable action for a declaratory judgment and injunction against Bausch & Lomb Optical Company, M. Herbert Eisenhart, Carl L. Bausch and Theodore B. Drescher (R. 243), which the Department of Justice customarily brings after disposing of the indictment in the anti-trust suit, Carl Zeiss, Inc., was not made a party.

In that part of petitioners' brief to this Court entitled "Reasons for Granting the Writ" (Petition, p. 13 et seq.) no reasons are given or suggested as to why the writ should be allowed as to Carl Zeiss, Inc.

Carl Zeiss, Inc., should not be confused with Carl Zeiss of Jena, which made the agreements with the Bausch & Lomb Optical Company and is not a party to this action.

ARGUMENT

Petitioners Have Shown No Reason Why A Writ of Certiorari Should Be Granted

I. The case was decided by the Courts below in accordance with the established law.

In *United States ex rel. Kessler* v. *Mercur Corporation, et al.*, 13 F. Supp. 742 (S. D. N. Y.—1935) affd. 83 F. (2d) 178; cert. den. 299 U. S. 576, Judge Patterson says as to the statute involved in this case:—

> "* * * An informer's action will therefore lie only in cases where the defendant has made false, fictitious or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' "

This he took from *United States* v. *Cohen*, (1926) 270 U. S. 339, pp. 345-346, where an indictment brought under Sec. 35 of the Penal Code was dismissed. In ch. 351 of the Laws of 1909, Sec. 5438, of the Revised Statutes, was repeated verbatim as Sec. 35 of the Penal Law so that the case is directly in point. The opinion points out clearly that Sec. 35 of the Penal Law relates only to the payment or approval of a claim against the Government based upon the Government's own liability for the claim. Further, at p. 346, it particularly holds that under Sec. 35 of the Penal Law the crime is restricted to defrauding the Government in dealing with the Government and that Sec. 37 of the Penal Law (which has nothing to do whatever with the Informer Statutes) makes it a crime to conspire against the Government.

In *United States ex rel. Marcus* v. *Hess*, 41 F. Supp. 197; Rev. 127 F. (2d) 233; Rev. U. S. Supreme Court (87 L. Ed. 374) where in an informer action the verdict of the District Court was sustained by this Court. The distinction is drawn between the facts in such cases as *United States* v. *Cohen (supra)*, 270 U. S. 339, and the facts before the Court in that case. See p. 378 and also p. 377, where Mr. Justice Black points out that Government money was placed in a joint fund for payment to the respondents who were before the Court and that these same respondents had been convicted under 18 U. S. C. 88 for the crime of fraudulently conspiring against the Government. The opinion of the solicitor general in that case, referred to in the petition, p. 23, has no application here where there is no conspiracy under Sec. 88 of the Penal Law and no criminal fraud as known to the law.

Likewise, in *United States* v. *New Orleans Chapter, etc.*, 127 F. (2d) 649, reversed United States Supreme Court, 87 L. Ed. 386, where the respondents also actually received proceeds of their conduct and had also been convicted under 18 U. S. C. 88.

The case at bar against Carl Zeiss, Inc., is devoid of any such charge of fraud or criminal conspiracy and comes clearly under the opinion in *United States* v. *Cohen (supra)*, 270 U. S. 339, and the holding in similar cases which decide that before there can be a cause of action there must be a false, fictitious or fraudulent claim based upon the Government's liability as in

> *United States ex rel. Kessler* v. *Mercur Corporation (supra)*, 13 F. Supp. 742, affd. 83 F. (2d) 178, cert. den. 299 U. S. 576;

Mandel v. *Cooper Corporation* (S. D. N. Y. 1941), 42 F. Supp. 317;

United States v. *Miskell* (1883), 15 Fed. 369.

The opinion of the Circuit Court of Appeals in the case at bar follows the same principal that there must be a false, fictitious or fraudulent claim against the Government and against funds due from the Government and that the cause of action cannot be founded on a monopoly alone.

II. That the Courts have consistently refused to entertain actions where the fraud was not such as defined in the Statutes:—

Olson v. *Mellon*, 4 F. Supp. 947 (W. D. Pa., 1933), affd. 71 F. (2d) 1021 (C. C. A. 3rd, 1934), cert. den. 293 U. S. 615 (1934);

United States v. *McMurtry*, 5 F. Supp. 515 (Ky., 1933).

III. An action under this statute cannot be maintained against a corporation.

Carl Zeiss is a domestic corporation incorporated under the laws of the State of New York (amended complaint, para. Fourth, R. 78).

Sec. 3490 of the Revised Statutes states that an action may be brought against "any person not in the military or naval forces of the United States, etc., etc." That the word "person" used in this section does not include a corporation and that the action can only be brought against an individual, see:

United States v. *Kansas Pac. Ry. Co. et al.* (1877), Fed. case #15506 (26 Fed. cases, p. 680).

Conclusion

This case does not raise questions of any special gravity or general importance. We have shown that the decision of the Circuit Court of Appeals, which petitioners desire to have reviewed, is in complete accord with the decisions of this and other federal courts. There has been no misinterpretation of the statute.

Petitioners have shown no reason for the granting of a writ of certiorari so far as Carl Zeiss, Inc., is concerned, and the petition should be denied.

Respectfully submitted,

RAYMOND M. WHITE,
Counsel for CARL ZEISS, INC.,
One Wall Street,
New York, N. Y.

Appendix

Sections 3490-3493 of the Revised Statutes (31 U. S. C. 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts,

for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Ch. 235 of the Laws of 1908, 35 Stat. p. 555 (embodied in 31 U. S. C. 231), reads as follows:

"Chap. 235.—An Act to amend section fifty-four hundred and thirty-eight of the Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That section fifty-four hundred and thirty-eight of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and

with intent to defraud the United States, shall be imprisoned at hard labor for not more than five years, or fined not more than five thousand dollars; and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be punished by imprisonment for not more than two years and by a fine not exceeding five hundred dollars."

Approved, May 30, 1908.

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	6
I. The decision below was correct; the proposed amended complaint fails to state a cause of action under the False Claims Statute	6
II. The question presented by petitioners is not open for consideration. In any event summary judgment for respondents was required since petitioners failed to present any genuine issue of fact	10
III. There is no conflict of decisions and the case is of no general importance	21
CONCLUSION	24
APPENDIX	25

Citations

Cases

Altman *v.* Curtiss-Wright Corporation, 124 F. (2d) 177 (C.C.A. 2, 1941)	13
Baran *v.* Goodyear Tire & Rubber Co., 256 Fed. 571 (S.D. N.Y., 1919)	7
Barnsdall Refining Corp. *v.* Birnamwood Oil Co., 32 F. Supp. 308 (E.D. Wis., 1940)	11

PAGE

Black & Yates, Inc. *v.* Mahogany Association, Inc., 34 F. Supp. 450 (D. Del., 1940), reversed on other grounds, 129 F. (2d) 227 (C.C.A. 3, 1942), cert. den. 87 L.E. 49 (Oct. 26, 1942) 7

Blair *v.* Oesterlein, 275 U.S. 220 (1927) 12

Curacao Trading Co. Inc. *v.* William Stake & Co. Inc., 5 F. R. S. 64 (S.D. N.Y., 1941, not officially reported) 8

Denver Stockyard Co. *v.* United States, 304 U.S. 470 (1938) 12

Duignan *v.* United States, 274 U.S. 195 (1927) 12

Glenn Coal Company *v.* Dickinson Fuel Co., 72 F. (2d) 885 (C.C.A. 4, 1934) 7

Gnozzo *v.* Marine Trust Company of Buffalo, 258 App. Div. 298 (1939), aff'd. without opinion 284 N.Y. 617 14

Helvering *v.* Minnesota Tea Co., 296 U.S. 378 (1935) 12

Helvering *v.* Tex-Penn Co., 300 U.S. 481 (1937) 12

Holland *v.* Majestic Radio & Tel. Corp., 27 F. Supp. 990 (S.D. N.Y., 1939) 8

Lipson *v.* Socony-Vacuum Corp., 76 F. (2d) 213 (C.C.A. 1, 1935), appeal dism'd. by stip. 301 U.S. 711 (1937) 7

McMullen *v.* Hoffman, 174 U.S. 639 (1899) 21

McJunkin *v.* Richfield Oil Corp., 33 F. Supp. 466 (N.D. Calif., 1940) 7

Murphy *v.* Mitchell, 249 Fed. 499 (N.D. N.Y., 1918).... 8

Prudential Ins. Co. of America *v.* Goldstein, 43 F. Supp. 767 (E.D. N.Y., 1942)..... 13

Standard Oil Co. *v.* United States, 283 U. S. 163 (1931) 9

Stanfa *v.* Bynum, 37 F. Supp. 962 (W.D. La., 1941).... 8

Sun Oil Co. *v.* Blevins, 29 F. Supp. 901 (W.D. La., 1939), aff'd. 110 F. (2d) 566 (C.C.A. 5, 1940)..... 8

Triangle Conduit & Cable Co., 38 F. Supp. 533 (D. Del., 1941); reversed on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942)..... 6

PAGE

Twin Ports Oil Co. *v.* Pure Oil Co., 26 F. Supp. 366 (D. Minn., 1939) 11

United States *v.* Newbury Mfg. Co., 123 F. (2d) 453 (C.C.A. 1, 1941) 6

United States ex rel. Kessler *v.* Mercur Corp., 13 F. Supp. 742 (S.D. N.Y., 1935) aff'd. 83 F. (2d) 178 (C.C.A. 2, 1936) cert. den. 299 U.S. 576 (1936)..... 7

United States ex rel. Marcus *v.* Hess, 87 Law. Ed. 374 (Jan. 18, 1943) 2, 7, 8, 18, 21, 22

Welch *v.* T. W. Warner Co., 47 F. (2d) 231 (S.D. N.Y., 1930); aff'd. 47 F. (2d) 232 (C.C.A. 2, 1931) 6

Zimmerman *v.* National Dairy Products Co., 30 F. Supp. 438 (S.D. N.Y., 1939) 8

Statutes

R.S. Secs. 3490-4 and 5438 (31 U.S.C.A., Secs. 231-5) 2, 25

Act of October 15, 1914, c. 323, Sec. 5 (Clayton Act), 38 Stat. 730, 731 (15 U.S.C.A. Sec. 16) 11

R.S. Sec. 3721 (34 U.S.C.A. Sec. 569)..... 17

Act of March 2, 1901, c. 803, 31 Stat. 895, 905 (10 U.S.C.A. Sec. 1201) 17

Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U.S.C.A. Sec. 1201) 17

Act of May 11, 1908, c. 163, 35 Stat. 106, 125 (10 U.S.C.A. Sec. 1199) 17

Act of June 30, 1914, c. 130, 38 Stat. 392, 399 (34 U.S.C.A. Sec. 568) 18

Act of June 30, 1921, c. 33, 42 Stat. 68, 90 18

Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754.... 18

Act of February 28, 1931, c. 326, 46 Stat. 1431, 1442.... 17

Act of June 30, 1932, c. 318, 47 Stat. 421, 441-442..... 18

Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540..... 18

Act of March 3, 1933, c. 212, Title 3, Sec. 2, 47 Stat. 1489, 1520 (41 U.S.C.A. Sec. 10a) 18

Act of March 15, 1934, c. 69, 48 Stat. 403, 421..... 18

Act of June 24, 1935, c. 291, 49 Stat. 398, 418..... 18

Federal Rules of Civil Procedure

PAGE

R. C. P. 9(b) 8, 9, 28
R. C. P. 11 ..... 5, 28
R. C. P. 15(a) 5, 6, 28
R. C. P. 56(e) 14, 29

Miscellaneous

H. R. 1203 23
New York Times, July 26, 1941 4
New York Times, May 19, 1942 4
New York Times, September 7, 1942 4
Rep. No. 263, 78th Cong. 1st Sess. 23
S. 920 23
Webster's New International Dictionary, 2d. Ed. 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

BRIEF IN OPPOSITION ON BEHALF OF BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER

Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered November 23, 1942 (R. 270).

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether, upon the facts in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under Sections 3490-3494 and 5438 of the Revised Statutes (31 U.S.C.A., Sections 231-235), where no cause of action was alleged, and both courts below have found and the record shows that no false, fictitious or fraudulent claims were made upon or against the United States.

Statutes Involved

The action is brought under Sections 3490-3494 and 5438 of the Revised Statutes (31 U.S.C.A., Sections 231-235), sometimes known and referred to herein as the False Claims Statute (Appendix, pp. 25-7).

Statement

This is a civil action for damages and penalties, alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the False Claims Statute (R. S. 3490-3494; 5438), which statute was recently considered by this Court in *United States ex rel. Marcus* v. *Hess* (U. S.), 87 L. Ed. 374 (decided January 18, 1943).

This action was instituted a year and a half after the final disposition in 1940 of certain criminal and civil anti-trust proceedings brought by the Department of Justice.

In those proceedings the Government attacked the validity of certain agreements between Bausch & Lomb and Carl Zeiss, of Jena, Germany (not sued herein), dealing with the manufacture and sale of military optical instruments under patents owned by Zeiss.* The anti-trust proceedings terminated in pleas of *nolo contendere*, payment of fines, and the entry of a consent decree (R. 243-8).** Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, expressly stated in open court at the time of acceptance of the pleas, in response to a direct question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, equity complaint, bills of particulars and exhibits, and consent decree are in the record (R. 86-248) and were before the courts below.

Petitioners concede that their case is based solely on the record in the anti-trust proceedings. Yet, when they served their complaint, long after the anti-trust proceedings had been terminated and ten days after Pearl Harbor (when these respondents were still more deeply concerned with war production), petitioners did not adhere to the allegations made in those proceedings. Instead, petitioners distorted the plain provisions of the written agreements involved in those proceedings and made other false allegations. Thus, the complaint (R. 3-10) departed from the facts of record in the anti-trust proceedings (on which

---

*These agreements made it possible for Bausch & Lomb to obtain for the use of the United States Government the patented and unpatented technical advancements of Zeiss in the field of military optical instruments and resulted in great benefits in the improvement of such instruments supplied to the Government (R. 30).

**The agreements had been suspended prior to the entry of the pleas and decree in the anti-trust proceedings (R. 246). These respondents settled those proceedings largely because they were too preoccupied with the increasing American armament program to prepare for and participate in a trial of the issues (R. 23-4, 30).

alone it was based) and, in an attempt to frame a complaint against Bausch & Lomb under the False Claims Statute, falsely alleged that under the agreements, Bausch & Lomb agreed to and did add 20% to its prices on sales by it of military optical instruments to the United States Government, and agreed to and did pay the amount of such markup to Carl Zeiss of Jena.* (Compare R. 25-7 and 233-6 with R. 5-8 and 221-2.) This was the basic charge of the complaint and its only material allegation of fact under the False Claims Statute.

Recognizing the gravity of charges that they had conspired to defraud and had defrauded their Government, and desiring to obtain immediate and definitive relief against the false charges so made in the complaint, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for summary judgment.** Respondents submitted affidavits in support of the motion (R. 17-33), made on knowledge, setting forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States. The affidavits further emphasized the critical importance of immediate disposition of the case to avoid interruption of work for the Government (R. 31).***

Before the return day of the motion, petitioners served a purported amended complaint (R. 78-85), withdraw-

---

* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb, but also of Carl Zeiss Inc.

** These respondents also attacked the venue of the action, but requested the district court to decide the case on the merits. Neither of the courts below passed upon the venue question.

*** Bausch & Lomb's contribution to our war effort has been repeatedly recognized. (See, among others, the award to it of the Navy "E" for achievement on July 26, 1941 (*New York Times*, July 26, 1941) and the award to it of the Joint Army and Navy "E" on September 7, 1942 (*New York Times*, September 7, 1942). It was the first company to receive the Navy "E" with Star (*New York Times*, May 19, 1942) and now has a total of three stars for continued excellence of production.)

ing the above mentioned allegations. Their falsity thus stood admitted.* In this document petitioners merely plagiarized the Government's charges in the anti-trust proceedings and added conclusory allegations of fraud substantially in the words of the False Claims Statute.

Respondents took immediate steps to prevent the petitioners from delaying final decision by this manoeuver. The purported amendment was rejected because it was untimely under Rule 15(a)** of the Federal Rules of Civil Procedure (R. 51, 54-6). Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the district court, on the motion for summary judgment, as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents, in the alternative, renewed the motion to dismiss and for summary judgment.

The district court held the attempted amendment a nullity, and denied leave to amend in accordance there-

* Although no explanation of the distortion of facts in the complaint was ever offered below, the petitioners now assert that it was an inadvertence (Pet. pp. 8, 20). For two lawyer-plaintiffs (one of whom was the sole counsel of record in the district court) to make so many inadvertent mistakes in plagiarizing matters of record in a suit by which they sought to recover more than $20,000,000 for themselves is rather unusual.

The amount of the claim itself also shows a reckless disregard for facts. The royalty record (R. 144) shows that the amount of $8,000,000 claimed by petitioners as *damages* for the year 1938 alone (R. 8-9) *exceeded* the *total sales* of military optical instruments by Bausch & Lomb in that year by over 800%. The ingenuous device of expanding the period covered by this claim in the purported amended complaint to include the last two months of 1937 (R. 84) only makes the distortion more obvious.

Such disregard of the responsibilities of verification by counsel imposed by Rule 11 of the Federal Rules (Appendix p. 28) furnishes some measure of the weight to be given to the conclusory allegations of fraud in the purported amended complaint as against the statements on knowledge in the respondents' affidavits.

** Appendix pp. 28-9.

with on the ground that the proposed amended complaint did not state a cause of action under the statute. It thereupon dismissed the complaint and granted summary judgment to respondents (R. 254-62). The Circuit Court of Appeals unanimously affirmed, *per curiam*, the orders and judgment of the District Court, being of the opinion that, whether amendment should have been permitted or not, respondents were entitled to summary judgment since this "action is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 267-9).*

ARGUMENT

POINT I

The decision below was correct; the proposed amended complaint fails to state a cause of action under the False Claims Statute.

Petitioners disavow the complaint with its false allegations. They stand on the purported amended complaint (R. 78-85). The courts below were clearly right in treating the purported amended complaint as insufficient to

---

* While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the district court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the district court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942). Compare *U. S.* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C.C.A. 1, 1941), which deals, however, with a motion to dismiss rather than a motion for summary judgment, to which a different rule is applicable.

In further denying leave to amend where the proposed amendment does not state a cause of action and would, therefore, merely require the court to entertain and grant a subsequent motion to dismiss, the district court followed the salutary doctrine applied in *Welch* v. *T. W. Warner Co.*, 47 F. (2d) 231 (S. D. N. Y., 1930, aff'd 47 F. (2d) 232 (C.C.A. 2, 1931), and other cases.

block summary judgment, as they were plainly right in granting summary judgment for respondents on the entire record (Point II, *infra**). Consideration of the record throws light on the reasons for petitioners' failure to comply with the fundamental rules of pleading discussed below. They could not plead the necessary factual allegations of the making of false or fraudulent claims by respondents because the record shows that no such facts exist. Thus, insistence on the insufficiency of the pleadings involves no mere technicality; it is necessary to protect these respondents from harassment and the courts from further consideration of utterly unfounded and insufficient allegations.

To state a cause of action under the False Claims Statute, facts, not conclusions of law, must be alleged to show that a false, fictitious and fraudulent claim against the United States has been actually paid or allowed. *United States ex rel. Kessler* v. *Mercur Corp.*, 13 F. Supp. 742 (S.D. N.Y., 1935), aff'd 83 F. (2d) 178 (C.C.A. 2, 1936), cert. den. 299 U.S. 576 (1936); *Cf. United States ex rel. Marcus* v. *Hess, supra.*

Nor is it enough to plead generally in the language of the Statute. *Glenn Coal Company* v. *Dickinson Fuel Co.*, 72 F. (2d) 885 (C.C.A. 4, 1934); *Lipson* v. *Socony-Vacuum Corp.*, 76 F. (2d) 213 (C.C.A. 1, 1935), appeal dism'd. by stip. 301 U. S. 711 (1937); *Baran* v. *Goodyear Tire & Rubber Co.*, 256 Fed. 571, 574 (S.D. N.Y., 1919); *McJunkin* v. *Richfield Oil Corp.*, 33 F. Supp. 466 (N.D. Calif., 1940); *Black & Yates, Inc.* v. *Mahogany Association, Inc.*, 34 F. Supp. 450 (D. Del., 1940), reversed on other grounds, 129

* It is also shown in Point II that the question presented by the Petition is not open on the record.

F. (2d) 227 (C.C.A. 3, 1942), cert. den. 87 L.E. 49 (Oct. 26, 1942). If facts to corroborate conclusory charges are not alleged, the court may properly take the view that the failure of the pleader to allege these facts creates the presumption that they do not exist. *Sun Oil Co.* v. *Blevins*, 29 F. Supp. 901 (W.D. La. 1939), aff'd 110 F. (2d) 566 (C.C.A. 5, 1940).

Since actions under the False Claims Statute are in essence actions for fraud (*United States ex rel. Marcus* v. *Hess, supra*), the pleader must comply with Rule 9(b) of the Federal Rules of Civil Procedure, which requires that in all averments of fraud the circumstances constituting the fraud must be stated with particularity.* General, unspecific and unsupported charges of fraud are insufficient. *Holland* v. *Majestic Radio & Tel. Corp.*, 27 F. Supp. 990, 992 (S.D. N.Y., 1939); *Zimmerman* v. *National Dairy Products Corp.*, 30 F. Supp. 438 (S.D. N.Y., 1939); *Curacao Trading Co. Inc.* v. *William Stake & Co. Inc.*, 5 F. R. S. 64 (S.D. N.Y., 1941, not officially reported); *Stanfa* v. *Bynum*, 37 F. Supp. 962 (W.D. La., 1941); see *Murphy* v. *Mitchell*, 249 Fed. 499 (N.D. N.Y., 1918.)

Measured by these established requirements, it seems obvious that even were amendment otherwise proper (which we do not concede) the proposed amended complaint could not be sustained. Nowhere does it allege facts constituting a single instance in which a false, fictitious or fraudulent claim was submitted to the United States by these respondents and allowed or paid. It also fails to allege such an instance with respect to Carl Zeiss of Jena (not named as a defendant in the action). The conclusory allegation that Bausch & Lomb and Carl Zeiss of Jena sold military optical instruments to the United

* See Appendix p. 28.

States "at arbitrary, artificial and unreasonable and non-competitive prices agreed upon" between them, certainly does not constitute the required specification, however proper the allegation might have been in an indictment under the Sherman Act or the Wilson Tariff Act, to which different rules of pleading apply. Similarly defective is the charge that Bausch & Lomb (not Zeiss) submitted "bids" to the United States "at prices that pretended to be and were represented to be, and which the Government * * * believed to be, the normal, prevailing and competitive prices for such * * * instruments", but which in fact were not, "but were in excess" of such prices. See *Standard Oil Co.* v. *United States,* 283 U. S. 163, 172 (1931). This allegation cannot be considered the statement of circumstances constituting fraud with the particularity required by Rule 9(b). The allegation immediately following does not even charge that "*such* bids" were accepted by the Government, but only that "*various* bids, submitted by the defendant Bausch & Lomb at various times", were so accepted, the dates, prices, amounts and other particulars of which are unknown. Information sufficient to claim damages in the astronomical amounts demanded should, if it existed, have permitted the specification of at least one instance of the misconduct charged as an earnest of petitioners' right to proceed. Finally it is alleged, in the words of the statute, that "the defendant * * * presented for payment and approval * * * bids, claims, invoices, bills, vouchers and statements and accounts" knowing the same to be "excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy * * *", and that the said claims, etc. were paid and satisfied. But, unless suits such as this are to enjoy

some immunity from the rules of pleading enforced in all other fraud actions to prevent imposition on the courts, such conclusory statements, in the statutory language, are wholly insufficient.

It is apparent, therefore, that the District Court correctly held the purported amended complaint insufficient. Whether the amendment was recognized or allowed and then dismissed, or rejected at the outset, was immaterial. Petitioners have made two attempts, on the basis of the records in the anti-trust proceedings, to demonstrate that they have a case within the statute on which they rely. In their first attempt they concededly distorted the facts; in their second, they have failed to comply with settled requirements applicable to pleading in such actions and have failed to allege a cause of action. The courts below correctly concluded that this failure was due to the absence of facts to support the serious charge made. Summary disposition was required; this litigation does not deserve to be further prolonged.

POINT II

The question presented by petitioners is not open for consideration. In any event summary judgment for respondents was required since petitioners failed to present any genuine issue of fact.

Briefly stated, the question presented by petitioners (Pet. p. 2) is whether an action lies under the False Claims Statute "where the record before the Court shows" that Carl Zeiss, of Jena, pursuant to agreements with Bausch & Lomb, "when invited by the United States to make a bid, was required to submit, and did in fact

submit excessive prices (so-called "protective offers") fixed by the American corporation" (Bausch & Lomb).*

Before passing to the fundamental misconstruction of the record embraced in petitioners' statement of the question, it should be noted that the question is not open on the record since no such question is tendered by or within petitioners' pleadings and no such claim was made in the courts below.

It is unnecessary to look to the complaint, which petitioners have abandoned. Its basic charge, that Bausch & Lomb added 20% to its prices on sales of military optical instruments to the United States, is concededly false.

The proposed amended complaint, the material and legally insufficient allegations of which are set forth under Point I, *supra,* likewise does not make the charge tendered for review. It carefully distinguishes between Carl Zeiss, Inc., a respondent to the instant petition, and Carl Zeiss, of Jena, not named as a defendant in the action (R. 79-80). The allegation with respect to the former is not that it bid and submitted excessive prices, but expressly that, pursuant to the conspiracy, it *refused* to bid (R. 81). The only allegation charging affirmative action with respect to the United States by Carl Zeiss, of Jena, is that

* In addition to the fundamental errors of fact embraced in petitioners' statement of the question presented which we point out *infra,* pages 12-18, there are several others which deserve mention. These respondents have not admitted that the patent licensing agreements with Zeiss were unlawful. Their pleas of *nolo contendere* to the anti-trust indictment did not constitute such admissions. See *Twin Ports Oil Co.* v. *Pure Oil Co.,* 26 F. Supp. 366 (D. Minn., 1939); *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.,* 32 F. Supp. 308 (E. D. Wis., 1940). The consent decree in the equity anti-trust case (R. 243-8) expressly recognizes the respondents' claim of innocence of violation of law (R. 243) and Section 5 of the Clayton Act (15 U.S.C.A., Sec. 16) provides that such consent decrees are not to be treated as admissions.

Also, the question as stated in the petition infers that summary judgment was granted by the courts below solely on the ground that "the complaint and the unlawful agreements showed no false representations in deceit of the United States" and that the lower courts did not consider the bills of particulars and exhibits in the anti-trust proceedings. The fact is, of course, that the summary judgment for respondents was necessarily based on the entire record before the courts below.

"• • • Bausch & Lomb and Carl Zeiss, of Jena, • • • by concerted action, • • • sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and non-competitive prices agreed on by the defendant Bausch & Lomb with Carl Zeiss, of Jena • • •" (R. 81). It is not alleged that Zeiss ever received payments from the United States Government for the sale of military optical instruments, but only that Bausch & Lomb did (R. 83). The remaining allegations, by reference to Bausch & Lomb, or to "the defendants," in terms exclude Carl Zeiss, of Jena (R. 83-5). The proposed amended complaint is not predicated upon the claim of the use of "protective offers" by Carl Zeiss of Jena to throw business to Bausch & Lomb (now asserted in the petition), but wholly on alleged sales by Zeiss and Bausch & Lomb at what are claimed to be fraudulent prices, thus making their several claims fraudulent. What petitioners seek is a review of a charge which they have not even pleaded, an omission which is fatal to review here. *Denver Stockyard Co.* v. *United States,* 304 U. S. 470, 485 (1938).

This obstacle to review is reinforced by the fact that no such claim was made in the courts below—it is obviously a new theory presented for the first time in the petition. There would appear to be no reason peculiarly applicable to *qui tam* cases for departing from the ordinary rule that this Court will not consider questions not submitted by petitioners to the courts whose judgments they attack. *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380 (1935); *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498 (1937); *Duignan* v. *United States,* 274 U. S. 195, 200 (1927); *Blair* v. *Oesterlein Co.,* 275 U. S. 220, 225 (1927).

Even if these familiar objections to review are disregarded, it is entirely clear that the decision below was correct in granting summary judgment to the respondents. The record is barren of any facts to support the assertions in the petition that the agreements between Bausch & Lomb and Carl Zeiss of Jena, or conduct under them, resulted in fraud upon the United States or submission of fraudulent claims to the United States. Thus, the petition tenders a wholly hypothetical question which this Court should not consider.

The remedy of summary judgment is provided to permit speedy determination on motion and without the delays and expense of trial of cases where the record shows that there is no genuine issue of fact to be tried. *Altman* v. *Curtiss-Wright Corporation,* 124 F. (2d), 177, 180 (C.C.A. 2, 1941); *Prudential Ins. Co. of America* v. *Goldstein,* 43 F. Supp. 767, 768 (E.D. N. Y., 1942). Here the courts below had before them the complete records in the anti-trust proceedings upon which, alone, petitioners' action was predicated. Affidavits on knowledge submitted by these respondents (R. 17-33) showed not only the falsity of the complaint (which petitioners immediately admitted by their attempt to amend) but asserted and set forth facts showing that Bausch & Lomb had not submitted claims within the statute. Even if objections to the sufficiency of the pleadings (Point I, *supra*) are disregarded, the petitioners' general allegations, unsupported by the anti-trust source material, were shown to be without substance in fact. It is the purpose of summary judgment to cut through such sham allegations without trial. Upon a motion for summary judgment, the court may properly accept statements of fact in affidavits made on knowledge against any mere conclusory allegations made on infor-

mation and belief in a pleading or elsewhere. This is the clear import of Rule 56(e), 28 U.S.C.A., following §723c*, (see *Gnozzo* v. *Marine Trust Company of Buffalo*, 258 App. Div. 298 (1939), aff'd. without opinion, 284 N. Y. 617). This is all the more true where, as here, the petitioners conceded the falsity of charges of fraud in their original complaint. In the balance of this Point we shall show in detail how completely the record fails to show any facts supporting the assertions of fraudulent conduct which are made for the first time in the petition.

Petitioners' new theory of their case requires that the record present a triable issue on each of the following points: (1) that competitive bids were necessary on military optical instruments; (2) that Carl Zeiss, of Jena, was invited by the United States Government to bid on the sale of such instruments in competition with Bausch & Lomb; (3) that when invited to bid Zeiss was required by agreement to quote prices, which included an amount (a so-called "protective offer") named by Bausch & Lomb, to be added to the price which Zeiss would otherwise have charged the Government for the particular instrument; (4) that, in fact, Zeiss quoted such prices to the United States Government; (5) that a contract was awarded on the basis of such a quotation; and (6) that a claim based on such contract was made upon and paid by the United States. The record is completely barren of any facts supporting any of these points.

At the outset of a scrutiny of the record, it is to be noted that the provisions of the agreements between Bausch & Lomb and Zeiss requiring "protective offers" under certain circumstances, upon which petitioners rely, were inserted in 1925 and eliminated in 1926 (R. 27, 233-4, 235-6, 241). No facts are alleged or contained in the record showing that this provision continued in effect

* Appendix p. 29.

thereafter.* On the contrary, the record specifically shows that "protective offers" were never used in connection with any transaction with the United States Government (R. 29).

The sole sources on which petitioners rely to gloss over the deficiencies in their pleadings do not contain any facts in support of the alleged fraud which petitioners now claim. Such facts are not alleged in the indictment in the anti-trust proceedings nor in the complaint in the equity anti-trust case. The bills of particulars, which contain the details of the Government's allegations in the indictment, obtained after an exhaustive investigation, mention only one sale (by Bausch & Lomb) to the United States Government, and only four other instances of any dealings or communications of any kind involving the United States Government in connection with Zeiss instruments. Analysis of these five instances shows that none supports petitioners' present claim.** In addition, respondents'

---

* The 1926 agreement (R. 238-42) contains no provision for "protective offers." Indeed, it expressly eliminates that provision (R. 241). In the teeth of such express agreement by the parties, the provision in the 1926 agreement that the parties shall "endeavor to give due consideration to one another's interests" cannot be read as importing into the agreement the very provision which it eliminates. While the Government's indictment and equity complaint allege a continuance in general terms, no facts in support thereof are alleged in the indictment or equity complaint and in no instance after 1926 does the Government's bill of particulars refer even to a foreign transaction involving a "protective offer". Communication with Zeiss on such foreign transactions is to be regarded only as compliance by a patent licensee with the provision for cooperation in the 1926 agreement. In these circumstances the courts below were entitled to accept the factual statements on knowledge in these respondents' affidavits, rather than any vague and unsupported general claims on behalf of petitioners. Respondents had not, of course, conceded the correctness of the allegations in the indictment or the equity complaint (R. 23-4, 30, 243). The record thus does not contain any facts showing continuance of the "protective offer" provision after 1926; even if it had, it would not affect the result since it is entirely clear on the record that "protective offers" were never used in connection with any transaction with the United States (R. 29).

** The first concerns the importation, on or about September 15, 1938, of a stereo-telemeter by Bausch & Lomb from Carl Zeiss, of Jena, which was sold by Bausch & Lomb to the United States Government for approximately $24,460 (R. 118-9, 142-3). It is not included in the bill of particulars as an instance of joint action but only in support of the jurisdiction of the Southern District over commerce passing through it (*Cf.* R. 118-9, 142-3). There is no indication whatever that this transaction was improper, the Government did not claim it to be, and the respondents' affidavits establish its propriety (R. 28).

The second, in 1929 (R. 138), was alleged by the Government to be one of three instances of Zeiss' refusal to sell military optical instruments in the

affidavits show (R. 28-9) that in the one instance in which a sample Zeiss instrument was supplied directly to the United States Government (not included in the Government's bill of particulars and not referred to by these petitioners) no "protective offer" was involved.

Thus the record is barren of any facts to show the actual making of any "protective offer" by Zeiss to the United States and *a fortiori* that there were "protective offers" by Zeiss which resulted in the award of any contract to Bausch & Lomb. Thus the "protective offer" provision, in effect only between 1925 and 1926, resulted in no conduct or claims affecting the United States which could possibly be regarded as within that provision. The prompt excision of the provision by the parties makes

---

United States unless Bausch & Lomb consented (only this one involving the Government); there was no claim that there was any "protective offer." On the contrary, it indicates that Zeiss submitted no offer at all, much less a "protective offer." Whatever may have been the relevance of such conduct to an anti-trust case, it does not support petitioners' claim that a fraudulent claim was made upon the United States.

The third, fourth and fifth (R. 138-9) are stated to be instances in which Zeiss offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb. Of the total of four such cases given (R. 139), one does not concern the Government. As to Items "(ii)" in 1928 and "(iii)" in 1935 in the bill (R. 139), there is no indication that they involved "protective offers" by Carl Zeiss, of Jena, and the Government, in the anti-trust proceeding, made no claim that they did; nor, for that matter, did it make any such claim with regard to Item "(i)" (R. 139), which refers to Exhibit U (R. 188-92). Exhibit U is a copy of a letter, dated March 7, 1928, from Bausch & Lomb to Carl Zeiss, of Jena. It appears therefrom that the American Embassy in Berlin, presumably on behalf of the Navy Department, inquired at Nedinsco (affiliated with Zeiss) with regard to the supply of three military optical instruments with accessories, in which modern type Bausch & Lomb had unsuccessfully attempted to interest the authorities at Washington. Zeiss was apparently of the opinion that, if the Embassy was interested in the instruments, it might redound to Bausch & Lomb's benefit in the future, and that Bausch & Lomb should enter into an agreement with Nedinsco with respect thereto. "Zeiss will quote date of delivery, usual foreign countries' price, delivered f.o.b. Rotterdam. 10% for you * * *." As appears from the cablegram of March 7, 1928 (R. 191), the quoted price was to include the commission. There is no evidence that the Government sought competitive bids. On the contrary, it appears that Bausch & Lomb was not invited to bid and that the inquiry abroad represented a new development in departmental policy. Furthermore, there is no indication that the quotation was ever actually made, and certainly none that the transaction matured into a sale and a subsequent claim on the Government. No consummation of any such transaction is reflected in the bill of particulars (*Cf.* R. 142-3). Respondents' affidavits indicate that this transaction did not in fact materialize (R. 28-9). Since the price to be quoted was the "usual" price which Zeiss quoted foreign countries, and included a commission of 10% for Bausch & Lomb (R. 188), there would, in any event, be no basis for concluding that such a quotation, if made, involved a "protective offer" or any excessive price.

any comment on its propriety quite academic. In further support of the view that petitioners' reliance on this provision is groundless, it is to be noted that there are neither allegations nor facts indicating that Bausch & Lomb and Carl Zeiss, of Jena, were at any time requested to make offers to the United States Government in response to invitations for competitive bids or that such offers were made, or, indeed, that competitive bidding by anyone was required by law. The opposite appears to be true of military optical instruments.* In any event it is inconceivable that the United States military authorities would have looked to Carl Zeiss, of Jena, or any other foreign concern, as its source of supply for such vitally important equipment as the range finders which control the gunfire of our ships—any more than they would have had our battleships constructed on foreign ways.** The only pur-

---

* Military optical instruments, being of a highly technical and specialized nature, are in a different category from much of the material which the Government purchases. Neither the Army nor the Navy is required to seek competitive bids on "ordnance." Webster's New International Dictionary, 2d Ed., defines "ordnance" as including range finders, etc., and the definition obviously is broad enough to cover all military optical instruments as defined in the complaints (R. 4, 80).

Among the statutes exempting ordnance from requirements of competitive bidding are:

As to the Army, the Act of May 11, 1908, c. 163, 35 Stat. 106, 125 (10 U.S.C.A. Sec. 1199), provides:

> "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

See also Act of March 2, 1901, c. 803, 31 Stat. 895, 905, Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U.S.C.A. Sec. 1201).

As to the Navy, R. S. Sec. 3721 (34 U.S.C.A. Sec. 569), provides in part:

> "* * * The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, * * *."

** Aside from the public policy affecting military optical instruments, during the past twenty years, at least, various Army and Navy appropriation acts have contained provisions manifesting the existence of a "Buy American" policy. The Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450, provided in part:

> "That in the expenditure of appropriations in this Act, the Secretary of the Navy shall, unless in his discretion the interest of the

chases of Zeiss military optical instruments are shown to have been for sample purposes (R. 28). Nor is there a single fact indicating that these respondents ever made a claim containing a representation that was false. In these respects and others this case differs fundamentally from that which was recently before this Court in *United States ex rel. Marcus* v. *Hess, supra.* Here the record discloses no fraud (in the form of collusive bidding or otherwise) and, on the contrary, expressly disproves it, and the two courts below have concurred in finding it absent and that there exists no issue of fact worthy of trial. In the *Marcus* case, fraud had been found by the jury and was conceded on appeal.

There is no basis for petitioners' somewhat varied claims (*Cf.* Pet. pp. 2, 16 and 18) that there was any misrepresentation in the transactions with the United States. The record shows no instance in which a bid by Zeiss or Bausch & Lomb did influence or possibly could have influenced the bid of the other or the Government's action on any bid. There is wanting any indication that, in fact, the Government ever purchased anything from either at excessive prices or that any claim within the statute was ever submitted by either. These infirmities do not go merely to the question of damages, as peti-

---

Government will not permit, purchase or contract for, within the limits of the United States, only articles of the growth, production or manufacture of the United States, notwithstanding that such articles of the growth, production or manufacture of the United States may cost more, if such excess of cost be not unreasonable."

Identical language is to be found in the following Navy Department appropriation acts: Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2; Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540; Act of March 15, 1934, c. 69, 48 Stat. 403, 421; Act of June 24, 1935, c. 291, 49 Stat. 398, 418.

Army appropriation acts containing provisions of similar import are: Act of June 30, 1921, c. 33, 42 Stat. 68, 90; Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754.

Furthermore, this "Buy American" policy is given general application by the Act of March 3, 1933, c. 212, Title 3, Section 2, 47 Stat. 1489, 1520 (41 U.S.C.A. Sec. 10a) (see also Act of June 30, 1914, c. 130, 38 Stat. 392, 399 (34 U.S.C.A. Sec. 568)).

tioners suggest (Pet. p. 20), they are basic defects in their cause of action. They required the courts below to make summary disposition of this case as they did. It would have been a travesty to interrupt the critical military production of these respondents by requiring them to submit to examinations before trial and trial (involving highly confidential work done for the Army and Navy with the obvious dangers to military security) while petitioners sought vainly for evidence to support general charges of fraud which Government counsel found absent after a Grand Jury investigation.

The failure of the record to sustain petitioners' claims of fraud is not surprising. Petitioners' charges are now based entirely on the anti-trust proceedings, since they have recanted the false charges in the original complaint. And the Government (partial beneficiary of this action) expressly disclaimed any charge of fraud in connection with the very transactions which are the sole basis of this suit. At the time the District Court was asked by counsel for the Government and for these respondents to accept *nolo contendere* pleas to the anti-trust indictment, the Court specifically asked Hon. Samuel S. Isseks, the Special Assistant to the Attorney General in personal charge of those proceedings, whether any charge of fraud was involved, and Mr. Isseks replied: "• • • There is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). The Court's question was not idle; its obvious purpose was to ascertain whether respondents' conduct justified the acceptance of mere *nolo* pleas. The representation made to the Court by Government counsel in charge of the case is entitled to great weight. The statement was made after a thorough investigation, with the aid of

Grand Jury subpoenas. It was made, moreover, by an official acting in the place of the District Attorney whose statutory duty it is to enforce the False Claims Statute by appropriate proceedings, civil and criminal, as well as the anti-trust laws. Thus, petitioners err in implying that the statement was somehow *ultra vires,* and it is hardly fair to Government counsel to imply that he was seeking to mislead the Court by using words in any technical sense when making a representation to the Court, whose purpose in asking for it he fully apprehended. We submit that the statement of disinterested Government counsel lends strong support to the decisions below. It casts the gravest doubt on the interested interpretation of the same transactions by those who made no personal investigation of them.

The moving affidavits for these respondents categorically stated that bids by Bausch & Lomb to the United States had not been participated in, or influenced by, Zeiss, and that such bids were not inflated (R. 27-33). Similarly, there were explicit statements made on knowledge that no false, fictitious or fraudulent documents had been submitted to the Government. Thus, upon the whole record, the courts below were bound to grant summary judgment for these respondents. The court below said:

> "To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which §232 would not protect them" (R. 269).

In this case petitioners have actually done no more than replead a violation of the anti-trust laws where all the penalties provided for by those laws have been exacted.

They suggest that the remedies for violation of those laws are inadequate (Pet. p. 24) and seem to urge that this action should be maintainable to supplement the remedies provided by law. But they are pursuing no remedy authorized by the anti-trust laws, and, if those laws need additional sanctions, Congress must provide them. Congress has provided very explicitly the essentials to permit recovery in such actions as this, as this Court has recently indicated in its opinion in *United States ex rel. Marcus* v. *Hess, supra.* This case fails to meet those requirements.

POINT III

There is no conflict of decisions and the case is of no general importance.

The agency rule in conspiracy cases is entirely inapplicable here. This record contains no facts to show that Zeiss (or Bausch & Lomb) made false representations to the United States either in furtherance of an alleged conspiracy or otherwise. It is obvious that there is no conflict with the familiar decisions in this field and the failure of the experienced court below even to advert to them emphasizes the fact that petitioners are now making a fresh contention which was not made below.

Nor is there conflict between the decisions below and *McMullen* v. *Hoffman,* 174 U. S. 639, or the other cases cited on page 17 of petitioners' brief. There is not only no factual allegation of "protective offers" by Zeiss to the United States but it affirmatively appears that there was no inflation of bids by Bausch & Lomb. There was therefore wholly absent the fraud and misrepresentation which is the predicate for this claimed conflict.

Likewise there is no conflict with the recent decision in *U. S. ex rel. Marcus* v. *Hess, supra.* The court below applied to the facts here essentially the same standards which this Court applied in its decision in the *Marcus* case and it pointed out the fundamental distinction between the facts in the two cases. In the *Marcus* case there was collusive bidding and there were false statements in some if not all bids that bidding was not collusive. Fraud was found by the jury and was not denied on appeal. Here all of those elements are wholly lacking.

This case depends upon its particular and special facts and the decision below cannot affect other Government contract cases with different facts. The contractual provision principally relied upon by petitioners was in fact wholly inoperative against the United States and consideration of that provision is academic. The record gives no support to the general claim (Pet. p. 23) that colorable bids were submitted and that either party was enabled thereby to increase its bids, and the decision below cannot be regarded as upholding such a practice—particularly where no such contention was even made in the pleadings or in the courts below.

Since the Court has so recently expounded the applicable statute in *United States ex rel. Marcus* v. *Hess, supra,* there is no need to reexamine it when it was correctly applied below. While in his brief *amicus* in the *Marcus* case the Solicitor General indicated his belief that the court below erred in one portion of its opinion (in that it construed the statute as requiring proof of deceit), he does not appear to have doubted the correctness of the final result below. Indeed in a portion of his brief not quoted by petitioners (p. 45) he seems to have indicated

his belief that the decision below was correct in so far as the particular facts in the case are concerned. In any event, since the disposition of the case by the courts below was clearly correct, there is no occasion to grant review merely to consider the Solicitor General's comment, which was obviously made chiefly to preserve the right to argue for a broader construction of the statute in a proper case. The Government can always litigate the question so mooted when it arises in a proper case. Here the charge is false representation or deceit and it is immaterial to this case whether other facts going beyond deceit would fall within the statute. It would be an undue hardship on the respondents to grant review merely for the purpose of considering this criticism, when the result, in this case, would not be affected.

Furthermore, it may be noted that Congressional action to repeal the informer provision of the False Claims Statute appears to be imminent so that subsequent cases under that provision may not arise. Repeal has been requested by the Attorney General*, the House has passed the Bill (H.R. 1203) and the Senate Committee on the Judiciary has under consideration a similar Bill (S. 920), at this writing.

Conclusion

The case was correctly decided below, there is no conflict of decisions and, as the decision below depends upon the particular facts, it is of no general importance. The Court has so recently construed the same statute that no further explication is now needed. The question presented

* See letter of Attorney General Biddle to the Speaker of the House, dated August 28, 1942, included in Rep. No. 263, 78th Cong. 1st Sess.

does not appear to be open for review upon this record. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

WHITNEY NORTH SEYMOUR,
Counsel for Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

SIMPSON THACHER & BARTLETT,
ALBERT C. BICKFORD,
Of Counsel.

April 16, 1943.

Appendix A

FALSE CLAIMS STATUTE

31 U. S. C. A., Sections 231-235

(R. S., Sections 3490-3494, 5438)

§ 231. LIABILITY OF PERSONS MAKING FALSE CLAIMS. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a

full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. (R. S. §§ 3490, 5438.)

§ 232. Same; Suits. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent. (R. S. § 3491.)

§ 233. Duty of District Attorney as to Such Cases. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for

the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. (R. S. § 3492.)

§ 234. Rights of Persons Presenting Such Suits. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States. (R. S. § 3493.)

§ 235. Limitation of Suit. Every such suit shall be commenced within six years from the commission of the act, and not afterward. (R. S. § 3494.)

Appendix B

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

28 U.S.C.A. following § 723c

Rule 9(b). *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

* * * * * * * * *

Rule 11. *Signing of Pleadings.* Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

* * * * * * * * *

Rule 15(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a

responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * * * * * * *

Rule 56—*Summary Judgment.*

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

FILE COPY

FILED
OCT 8 1943
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief on Behalf of Respondents Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher

WHITNEY NORTH SEYMOUR,
Counsel for Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
Of Counsel.

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Question Presented 2

Statutes and Rule Involved 2

Statement 5

Summary of Argument 10

I. The decision of this Court in United States *ex rel.* Marcus *v.* Hess is clearly distinguishable on its facts 12

II. The courts below properly granted summary judgment to these respondents since petitioners, in the face of respondents' affidavits, failed to present evidence which would give rise to a genuine issue as to any material facts, and respondents were entitled to judgment as a matter of law 13

(a) The affidavits filed by petitioners in opposition to the motion for summary judgment are totally insufficient to raise genuine issues of fact 15

(b) The record shows no competitive bidding requirement and no thwarting thereof; the exhibits raise no genuine issue of fact .. 22

(c) On the facts of record respondents were entitled to judgment as a matter of law 29

III. The Government's Brief as *amicus curiae* in support of the petition poses a question which on this record is hypothetical and the criticism of the construction by the court below of R. S. §5438 as requiring deceit appears to be unfounded 37

(a) The statute was designed and passed to prevent deceitful practices, to prevent "cheating" the Government; deceit is the essence of the offense 38

(b) The statute has been construed as being limited to deceitful practices 39

(c) The statute should be strictly construed and not set at large or treated as an additional sanction for the anti-trust laws 40

Conclusion 47

Appendix 48

Table of Cases Cited

Abbey Sales Company, Inc. *v.* Johnson, 262 App. Div. 1021, 30 N. Y. Supp. (2d) 295 (1941) 21

A. B. Small Co. *v.* American Sugar Refining Co., 267 U. S. 231, 239 (1925) 42

A. B. Small Co. *v.* Lamborn & Co., 267 U. S. 248, 252 (1925) 36

PAGE

Allen *v.* Radio Corporation of America, 47 F. Supp. 244 (D. Del., 1942).. 19
Altman *v.* Curtiss-Wright Corporation, 124 F. (2d) 177, 180 (C.C.A. 2, 1941) 14

Banco de Espana *v.* Federal Reserve Bank, 114 F. (2d) 438 (C.C.A. 2, 1940) 20
Barnsdall Refining Corp. *v.* Birnamwood Oil Co., 32 F. Supp. 308 (E. D. Wis., 1940) 20
Barnsdall Refining Corp. *v.* Birnamwood Oil Co., 32 F. Supp. 314, 315, 316 (E. D. Wis., 1940)..... 36
Belote *v.* O'Brian's Adm'r, 20 Fla. 126, 138 (1883)..... 21
Benson *v.* Crane, 257 Ill. App. 71, 91 (1930)..... 34
Boerner *v.* United States, 26 F. Supp. 769 (E. D. N. Y., 1939)..... 20
Bridgeman *v.* United States, 140 Fed. 577, 594 (C.C.A. 9, 1905)..... 40
Buckeye Powder Company *v.* E. I. DuPont de Nemours Powder Company, 248 U. S. 55, 63 (1918)..... 21

Carroll *v.* Paramount Pictures, 3 F. R. D. 95, 97 (S. D. N. Y., 1942).. 13
City of Oakland *v.* California Construction Co., 15 Cal. (2d) 573 (1940) 29
Cohen *v.* 11 West 42nd Street Inc., 115 F. (2d) 531, 532 (C.C.A. 2, 1940) 13
Commonwealth *v.* Exler, 243 Pa. 155, 89 Atl. 968 (1914)..... 44
Commonwealth *v.* Wells, 110 Pa. 463, 468, 1 Atl. 543 (1885)..... 44

Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373, 402 (1911).. 34
D. R. Wilder Mfg. Co. *v.* Corn Products Refining Co., 236 U. S. 165, (1915) 36

Edward B. Marks Music Corp. *v.* Stasny Music Corp., 4 Fed. Rules Serv. 773 (S. D. N. Y., 1941).....13, 20
Excelsior Wooden Pipe Company *v.* Pacific Bridge Company, 185 U. S. 282 (1902) 34

Fishman *v.* Teter, 133 F. (2d) 222, 223 (C.C.A. 7, 1943)..... 13
Fletcher *v.* Krise, 120 F. (2d) 809 (App. D. C., 1941), cert. den. 314 U. S. 608 (1941) 13
Fox *v.* Johnson & Wimsatt Inc., 31 F. Supp. 64, aff'd 127 F. (2d) 729 (App. D. C., 1942)..... 20

Henderson *v.* Glosser, 46 F. Supp. 458 (W. D. Pa., 1942)..... 13
Herndon *v.* Lowry, 301 U. S. 242, 261 (1937)..... 41
Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 660, 90 N. W. 1094, 1096 (1902)..... 21
Hummel *v.* Wells Petroleum Co., 111 F. (2d) 883 (C.C.A. 7, 1940)..... 20

John D. Park & Sons *v.* Hartman, 153 Fed. 24, 30 (C.C.A. 6, 1907).... 34

Kettenbach *v.* United States, 202 Fed. 377, 383 (C.C.A. 9, 1913)..... 21

Littlefield *v.* Perry, 21 Wall. 205 (1874)..... 34

Manning *v.* Galland-Henning Pneumatic Malting Drum Mfg. Co., 141 Wis. 199, 203, 204, 124 N. W. 291, 292, 293 (1910)..... 34
McMullen *v.* Hoffman, 174 U. S. 639 (1899)..... 29
Miller *v.* Miller, 122 F. (2d) 209 (App. D. C., 1941)..... 13

Person *v.* United States, 112 F. (2d) 1 (C.C.A. 8, 1940), cert. den. 311 U. S. 672 20
Prudential Ins. Co. of American *v.* Goldstein, 43 F. Supp. 767, 768 (E. D. N. Y., 1942) 14

Richard *v.* Credit Suisse, 242 N. Y. 346, 350 (1926)..... 14
Roscoe Lumber Co. *v.* Standard Silica Cement Co., 62 App. Div. 421, 70 N. Y. Supp. 1130 (1901)..... 21

PAGE

Seim *v.* Krause, 13 S. D. 530, 83 N. W. 583 (1900) 21
Seven Cases *v.* United States, 239 U. S. 510, 517 (1916) 41
Seward *v.* Nissen, 2 F. R. D. 545 (D. Del., 1942) 13, 14, 20
Sherrill *v.* Alabama Appliance Co., Inc., 240 Ala. 46, 197 So. 1 (1940) .. 34

Town of River Junction, *et al. v.* Maryland Casualty Co., 110 F. (2d) 278 (C.C.A. 5, 1940) 20
Triangle Conduit & Cable Co. *v.* Nat. Elec. Products Corp., 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942) 9
Twin Ports Oil Co. *v.* Pure Oil Co., 26 F. Supp. 366 (D. Minn., 1939), aff'd 119 F. (2d) 747, 314 U. S. 644 20

United States *v.* Adams Exp. Co., 119 Fed. 240 (S. D. Iowa, E. D., 1902) 21
United States *v.* Cohen Grocery Co., 255 U. S. 81, 89 (1921) 41, 42
United States *v.* Cooper Corp., 312 U. S. 600, 606 (1941) 45
United States *v.* Goggin, 1 Fed. 49 (C. C. E. D. Wis., 1880) 39
United States *v.* Green, 26 Fed. Cas. 32, No. 15,257 (C. C. E. D. Wis., 1879) 39
United States *v.* Kessler, 43 F. Supp. 408, 412 (E. D. N. Y., 1942) 21
United States *v.* McKay, 45 F. Supp. 1001, 1002 (E. D. Mich. S. D., 1942) 21
United States *v.* Newbury Mfg. Co., 123 F. (2d) 453 (C.C.A. 1, 1941) .. 9
United States *ex rel.* Brensilber, *et al. v.* Bausch & Lomb Optical Company, *et al.*, 131 F. (2d) 545 (C.C.A. 2, 1942) 1
United States *ex rel.* Edelstein *v.* Brussell Sewing Machine Co., Inc. (S. D. N. Y., 1943) so far unreported and printed as Appendix C herein 42
United States *ex rel.* Marcus *v.* Hess, 317 U. S. 537 (1943) 9, 10, 12, 25, 38, 39, 40, 41, 42, 44

Welch *v.* T. W. Warner Co., 47 F. (2d) 231 (S. D. N. Y., 1930), aff'd 47 F. (2d) 232 (C.C.A. 2, 1931) 9
Whitaker *v.* Coleman, 115 F. (2d) 305, 307 (C.C.A. 5, 1940) 14

Statutes

Act of March 2, 1901, c. 803, 31 Stat. 895, 905 (10 U.S.C. Sec. 1201) 26
Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U.S.C. Sec. 1201) 26
Act of May 11, 1908, c. 163, 35 Stat. 106, 125 (10 U.S.C. Sec. 1199) 26
Act of June 30, 1914, c. 130, 38 Stat. 392, 399 (34 U.S.C. Sec. 568) 27
Act of June 30, 1921, c. 33, 42 Stat. 68, 90 27
Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754 27
Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450 27
Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2 27
Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540 27
Act of March 3, 1933, c. 212, 47 Stat. 1489, 1520 (41 U.S.C. Sec. 10a) .. 27
Act of March 15, 1934, c. 69, 48 Stat. 403, 421 27
Act of June 24, 1935, c. 291, 49 Stat. 398, 418 27
Clayton Act, Section 5 21
Revised Statutes:
Section 3490 ..... 2, 3, 5, 40
Sections 3491-3 ..... 2, 3, 5
Section 3494 ..... 2, 3, 5, 32
Section 3721 26
Section 5438 ..... 2, 3, 5, 40
Sherman Anti-Trust Act, Section 1 5
Wilson Tariff Act, Section 73 5

Federal Rules of Civil Procedure

	PAGE
R. C. P. 12(b)	7
R. C. P. 15(a)	8,9
R. C. P. 56	3, 4, 10, 13, 15, 19
R. C. P. 56(e)	4, 7, 10, 16, 19, 20, 22

Miscellaneous

Annual Reports of the Navy Department for 1924	27
Baker, Optical Instruments in the Fighting Services	27
Clark, Summary Judgments	15
Cleary, Range Finders and Range Finding	32
Congressional Record (76th Congress, 1st Sess.)	44
Congressional Record (78th Congress, 1st Sess.)	45
Government Contracts, Report No. 2, 37th Congress, 2nd Sess. (1862)	38
Government Contracts, Reports Nos. 49 and 50, 37th Congress, 3rd Sess. (1863)	38
H. Rpt. No. 263 and H. R. No. 1203, 78th Congress, 1st Sess.	45
Opinions of the Attorney General (U. S.), Vol. 21	2
Ordnance Dept., The Manufacture of Optical Glass and of Optical Systems	33
S. 2719, 76th Congress, 1st Sess.	44
Shientag, Summary Judgment	18
The United States Government Manual, Fall 1942	26
Webster's New International Dictionary, 2d Ed.	26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *ex rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER

Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 23, 1942 (R. 270). Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted May 3, 1943 (R. 271).

Question Presented

Whether, upon the record in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under §§3490-3494 and 5438 of the Revised Statutes.

Statutes and Rule Involved

This action was instituted under R. S. §3490, which incorporates by reference certain of the provisions of R. S. §5438 as they appeared in 1874, when the act establishing the Revised Statutes was approved. Both of these sections are contained in what is generally known and referred to as the Informer's Act, R. S. §§3490-3494, 5438, and provide as follows:

Revised Statutes, §3490:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may

have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Revised Statutes, §5438:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars."

The entire Informer's Act, including Revised Statutes, §§3491-3494, is printed in Appendix A.

Since this case involves the correctness of summary judgment for respondents, the pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are set forth below:

RULE 56

Summary Judgment

* * *

"b. *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

c. *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

e. *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Rule 56 is quoted in its entirety in Appendix B, *infra*, page 52.

Statement

This is a civil action for damages and penalties alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the Informer's Act (R. S. §§3490-3494; 5438, unamended). It was instituted a year and a half after the final disposition, in July, 1940, of certain criminal and civil proceedings which had been brought by the Anti-Trust Division of the Department of Justice. The Government had claimed that Bausch & Lomb, Carl Zeiss of Jena, Germany (not sued herein), and the other defendants herein had participated in a conspiracy and combination restraining foreign commerce in violation of Section 1 of the Sherman Anti-Trust Act* and in restraint of import trade in violation of Section 73 of the Wilson Tariff Act.**

Those charges were based on certain agreements entered into between Bausch & Lomb and Carl Zeiss of Jena in 1921 and 1925, and a superseding agreement made in 1926, under which Bausch & Lomb acquired the exclusive license and right to manufacture and sell military optical instruments in the United States under the inventions and patents of Carl Zeiss of Jena and assurance of its technical assistance and cooperation in scientific research for improvements and inventions in that field (R. 157-167). Zeiss was to receive a royalty on all military optical instruments sold by Bausch & Lomb (R. 158). The Government did not charge either that Bausch & Lomb had a monopoly in the manufacture and sale of military optical instruments in the United States or to the United States

* Act of July 2, 1890, Ch. 647, §1, 26 Stat. 209, 15 U.S.C., §1.

** Act of August 27, 1894, Ch. 349, §73, 28 Stat. 570; February 12, 1913, Ch. 40, 37 Stat. 667, 15 U.S.C., §8.

Government, or that the purpose or intent of the agreements was to give it such a monopoly.

The anti-trust proceedings terminated in pleas of *nolo contendere,* the payment of fines and the entry of a consent decree (R. 243-248), which expressly provided that no testimony had been taken; that the defendants consented to the entry of the decree without any findings of fact "upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States * * *" (R. 243).* Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, stated in open court at the time of acceptance of the pleas, in response to a question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, the Government's bills of particulars and exhibits, the equity complaint, and the consent decree are in the record (R. 86-248) and were before the courts below.

Petitioners have not denied, and the record clearly shows, that their case is based solely on the court record in the anti-trust proceedings. Yet, when they served their complaint (R. 3-10), it contained general charges of fraud predicated upon a distorted version of the provisions of the written agreements which were matters of record in that proceeding.

This misconstruction, which petitioners now claim to have been merely inadvertent, permeated the complaint. It was charged that under the agreements Bausch & Lomb agreed to and did add 20% to its prices on sales by it of

* These respondents settled those proceedings largely because they were too preoccupied with the increasing demands of our armament program to prepare for and participate in a trial (R. 23-24, 30).

military optical instruments to the United States Government, and agreed to and did pay the amount of such mark-up to Carl Zeiss of Jena. (Compare R. 25-27 and 233-236 with R. 5-8 and 221-222.) Nor was this the only distortion of facts of record to be found in that pleading.*

Desiring to obtain immediate and definitive relief against the false charges of fraud which had been made, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for summary judgment.** In conformity with the explicit requirements of Rule 56(e) of the Federal Rules of Civil Procedure (Appendix B, p. 53) respondents submitted affidavits in support of the motion (R. 17-33), based on personal knowledge, in which the affiants set forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States Government. The affidavits showed the critical importance of immediate disposition of the case to avoid interruption of work for the Government. The petitioners opposed with affidavits which clearly failed to meet the requirements of Rule 56(e), contained no facts based upon knowledge in support of the complaint, and merely served to bring the anti-trust proceedings file into the record (R. 64-77).

Just before the return day of the motion, petitioners served a partially renovated complaint (R. 78-85), withdrawing the above noted false charges. This document merely plagiarized the Government's charges in the anti-

* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss, Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb but also of Carl Zeiss, Inc.

** These respondents also attacked the venue of the action, but requested the District Court to decide the case on the merits. Neither of the courts below passed upon the venue question, which, however, has not been waived and is reserved. See Rule 12(b) of the Federal Rules of Civil Procedure (Appendix B). We do not argue it here because we assume that the Court will not wish to pass upon a question not decided below.

trust proceedings and repeated general charges of fraud in an attempt to bring the case under the Informer's Act.

Respondents took immediate steps to forestall this attempt to delay final decision. The purported amended complaint was rejected because it was an untimely amendment as of course under Rule 15(a) of the Federal Rules of Civil Procedure (R. 51, 54-56; Appendix B, p. 51), inasmuch as the respondents, by moving for summary judgment, had already interposed a "responsive pleading" within the fair meaning of that Rule. Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the District Court on motion for summary judgment as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents in the alternative renewed the motion to dismiss and for summary judgment (R. 46-56).

The District Court in one judgment dismissed the original complaint and granted summary judgment for all respondents (R. 259-262). In a separate order, it granted respondents' motions with respect to the attempted amendment, declared it to be a nullity, and denied leave to amend in accordance therewith (R. 254-8). Not having permitted amendment, it did not pass directly upon respondents' motions to dismiss the amended complaint, although its denial of amendment was based upon the view that it did not state a cause of action (R. 258). Petitioners appealed from the judgment and the order of the District Court. On November 5, 1942, the Circuit Court of Appeals unanimously affirmed, *per curiam*, the orders and judgment of the District Court, being of the

opinion that whether amendment should have been permitted or not, or whether or not the proposed amended complaint, taking it as it read, stated a cause of action, summary judgment for defendants was required (R. 267-269).*

On January 18, 1943, this Court handed down its decision in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943). Thereupon, these petitioners, adopting a new theory of fraud, sought certiorari.

The Solicitor General filed a brief *amicus* in support of the petition apparently because Government counsel regarded the construction of the statute by the court below (as using fraud in the accepted sense of deceit) as being too narrow. The brief was, naturally, concerned with what the court below said; it did not attempt to analyze this record and consider what the court, in fact, did in affirming summary judgment. As a result, the brief expressed apprehension as to possible disposition of cases quite unlike this one, a matter which should wait until they arise.

---

*While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the District Court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the District Court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd. on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942). The reason for limiting the right to amend without leave of court after such a motion is obvious; plaintiff should then meet the motion on the merits and should not be permitted to delay consideration by *ex parte* amendment. If he can show good grounds for amendment, the application should be made to the court, which can consider them. Compare *United States* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C.C.A. 1, 1941), which deals, however, with a motion to dismiss rather than a motion for summary judgment. Where only a motion to dismiss is made and defendant has not invoked a scrutiny of the underlying facts, reason may well exist for permitting correction of the pleading without application to the court. In holding that amendment should be denied when the proposed amendment is insufficient, the District Court was on sound ground. See *Welch* v. *T. W. Warner Co.*, 47 F. (2d) 231 (S.D.N.Y., 1930), aff'd. 47 F. (2d) 232 (C.C.A. 2, 1931). It is unnecessary for this Court to pass on these questions since, as the court below held, they are academic because summary judgment for respondents was correct. The argument that neither the original nor the amended complaint was sufficient, even on its face, is contained in Point I of our Brief in Opposition, to which reference is respectfully made.

Summary of Argument

The recent decision of this Court in *U. S. ex rel. Marcus* v. *Hess, supra,* is clearly distinguishable on its facts from this case.

The court below was clearly right in affirming summary judgment for these respondents, and that disposes of the case. Respondents' motion for summary judgment, made under Rule 56 of the Federal Rules, unlike a demurrer, required the court to consider not mere formal allegations of pleadings but the admissible evidence, if any, in support of those allegations. The respondents' affidavits in support of the motion, conformed to the explicit requirements of Rule 56(e) and showed that there was no basis for petitioners' claims that Bausch & Lomb had violated any of the provisions of the Informer's Act.

The counter-affidavits filed by petitioners failed to meet the requirements of Rule 56(e) and were insufficient to establish the existence of a triable issue of fact. Such affidavits merely incorporated by reference the court record in anti-trust proceedings. Neither the indictment, the bills of particulars nor the equity complaint and consent decree in the anti-trust proceedings constituted admissible evidence under Rule 56(e). Correspondence attached to the Government's bills of particulars did not support petitioners' claims. There was no admissible evidence of any false bids or claims by Bausch & Lomb in any dealings with the United States nor was there any evidence that "protective offers" had ever been used in such dealings.

This record does not support petitioners' claim that the agreements between Zeiss and Bausch & Lomb involved a conspiracy to thwart the competitive bidding process. It does not appear that Ziess was a potential competitive bidder or that military optical instruments

were subject to competitive bidding requirements. Facts which may be noticed indicate the contrary. The 1921 and 1925 agreements were superseded and revoked by the 1926 agreement, and no evidence in the record, dealing with the period either before or after 1926, shows any fraud on the Government. The court below did not interpret the agreements as thwarting competitive bidding. It took the view that, at most, the agreements might reflect an anti-trust law violation and that this, in itself, could not make claims by Bausch & Lomb against the United States fraudulent. Thus on this record, the court below was bound to affirm summary judgment for these respondents.

Since this case does not involve competitive bidding, the problem with which the Solicitor General was concerned in his brief *amicus* is hypothetical and should not be decided here.

The construction of the Informer's Act by the court below as requiring deceit was correct. It is supported by legislative history, the normal meaning of the words used, previous judicial decision and other considerations.

A broader construction, setting the statute at large, so that it might apply retrospectively to transactions not within its fair meaning, would not only engender doubts of its validity but introduce undesirable elements of uncertainty into dealings with the Government. The suggestion that the statute should be extended to provide an additional sanction for the anti-trust laws is one which should be addressed to Congress.

POINT I

The decision of this Court in *U. S. ex rel. Marcus* v. *Hess* is clearly distinguishable on its facts.

Petitioners rely heavily upon the recent decision of this Court in *U. S. ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943), a decision which has no application to the facts of this case.

It will be recalled that in *Marcus* v. *Hess* a jury had found the defendants guilty of engaging in a conspiracy whereby they had effectively eliminated all possible competition in competitive bidding on PWA projects. Although the Circuit Court was of the opinion that a fraud was involved, it nevertheless concluded that the fraud had not been perpetrated upon the United States Government. This Court reversed, holding that fraudulent claims had been submitted to the United States Government within the meaning of the statute.

Since no such problem is involved in this case, it remains only to consider whether the facts are sufficiently similar as to warrant the conclusion that there was fraud in this case within the meaning of the Informer's Act.

In its opinion in *Marcus* v. *Hess,* this Court pointed out the critical facts of that case when it said, at page 543:

> "* * * The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from 'competitive bidding.' The bidding itself was a federal requirement; * * * and many if not most of the respondents certified that their bids were 'genuine and not sham or collusive.'
>
> * * * * * * *

> • • • the respondents thus caused the Government to pay claims • • • under contracts found to have been executed as the result of the fraudulent bidding."

In the face of a motion for summary judgment and the affidavits of these respondents, petitioners have failed to set forth any admissible evidence tending to prove that this case comes within any of those facts.

POINT II

The courts below properly granted summary judgment to these respondents since petitioners, in the face of respondents' affidavits, failed to present evidence which would give rise to a genuine issue as to any material fact, and respondents were entitled to judgment as a matter of law.

The crucial question is whether the courts below properly granted summary judgment to these respondents. If that determination was correct, as we contend, nothing remains of this case.

Unlike a demurrer, which assumes the truth of the facts properly pleaded and merely tests their legal sufficiency, the motion for summary judgment, brought pursuant to Rule 56 of the Federal Rules of Civil Procedure (Appendix B, p. 52), pierces the formal issues raised by the pleadings* or the allegations of the complaint when a defendant has moved before answer,** and calls into

---

* *Fletcher* v. *Krise*, 120 F. (2d) 809 (App. D.C. 1941), cert. den. 314 U. S. 608 (1941); *Fishman* v. *Teter*, 133 F. (2d) 222, 223 (C.C.A. 7, 1943); *Miller* v. *Miller*, 122 F. (2d) 209 (App. D.C. 1941); *Edward B. Marks Music Corp.* v. *Stasny Music Corp.*, 4 Fed. Rules Serv. 773 (S.D.N.Y. 1941).

** *Seward* v. *Nissen*, 2 F.R.D. 545 (D.C. Del., 1942); *Henderson* v. *Glosser*, 46 F. Supp. 458 (W.D. Pa., 1942). See also: *Cohen* v. *11 West 42nd Street Inc.*, 115 F. (2d) 531, 532 (C.C.A. 2, 1940); *Carroll* v. *Paramount Pictures*, 3 F.R.D. 95, 97 (S.D.N.Y., 1942).

question the existence of a *genuine* issue as to any *material* fact. In the absence of such an issue, the case does not merit a trial but is determinable as a matter of law.

The purpose of summary judgment was succinctly described by Judge Cardozo for the New York Court of Appeals:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial." (*Richard* v. *Credit Suisse*, 242 N. Y. 346, 350 (1926).)

Thus, it provides a method of determining on motion spurious or unfounded claims and those otherwise lacking in merit without the delay and expense which would be incident to a trial. *Altman* v. *Curtiss-Wright Corporation*, 124 F. (2d) 177, 180 (C.C.A. 2, 1941); *Prudential Ins. Co. of America* v. *Goldstein*, 43 F. Supp. 767, 768 (E.D.N.Y., 1942).

The motion affords a preliminary analysis and evaluation of the evidence in the possession of both sides. *Seward* v. *Nissen*, 2 F.R.D. 545 (D. Del., 1942). As was said in *Whitaker* v. *Coleman*, 115 F. (2d) 305, 307 (C.C.A. 5, 1940):

> "Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

This outline of the nature of the summary judgment procedure is necessary since petitioners and Government counsel (in their brief *amicus* in support of the petition)

argued the case as if it were primarily concerned with a demurrer. As a result of this misconception, petitioners rely upon allegations in the so-called amended complaint and assume others which do not even appear there, all of which are unsupported by admissible evidence. Then, assuming their truth, they seek to support the legal sufficiency of such allegations. This approach to the record disregards the true nature of the proceedings below and thus obscures the question before the Court.

The court below was fully aware of the fact that it was deciding a summary judgment case, a procedure much used in the State and Federal Courts of New York.* Its observation that even if the amended complaint stated a cause of action, taking it as it read, nevertheless summary judgment was required, attests that facts, not unsupported allegations, were the subject matter of its scrutiny. The substance of the decisions below, in strict accordance with the requirement of Rule 56, is that in the face of respondents' proofs no admissible evidence was adduced by petitioners which presented any genuine material issue of fact, and respondents were entitled to judgment as a matter of law. The correctness of this conclusion overwhelmingly appears when the record is examined.

(a) The affidavits filed by petitioners in opposition to the motion for summary judgment are totally insufficient to raise genuine issues of fact.

The moving papers of these respondents, on their motion for summary judgment, included affidavits which

---

* *Cf.* Rule 113, New York Rules of Civil Practice, adopted in 1921. See Judge Charles E. Clark (who sat below and acted as Reporter for the Revisers of the Federal Rules), *Summary Judgments*, Jud. Admin. Monographs, Series A, No. 5 (American Bar Association, 1941).

conformed to the explicit requirements of Rule 56(e) (Appendix B, p. 53); they were made on personal knowledge, by persons competent to testify as to the matters stated therein and set forth facts which would be admissible in evidence.

Mr. Eisenhart, President and General Manager of Bausch & Lomb Optical Company, in an affidavit (R. 17-31), which was adopted by Mr. Carl Bausch, its Vice-President in Charge of Engineering and Research (R. 32), and Mr. Drescher, its Vice-President in Charge of Manufacture (R. 33), in effect testified to the following:

That the 1925 amendments to the 1921 agreement were in terms revoked by the 1926 agreement (R. 27). That Bausch & Lomb had not agreed to inflate its bids on military optical instruments supplied to the United States Government by any amount and had not in fact done so (R. 27); that the price to be charged the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone, without the participation or consent of any other organization (R. 27-28); that bids made by Bausch & Lomb to the United States Government for such military optical instruments did not include 20% or any other artificial sum to be paid by Bausch & Lomb (R. 28); that the only payments made by Bausch & Lomb were the royalty payments, which did not exceed 7% and were paid to Carl Zeiss of Jena, as provided in the agreements (R. 28); that sample instruments of foreign manufacture have occasionally been imported for examination and testing (R. 28); that since Bausch & Lomb had manufacturing rights under designs and patents of Carl Zeiss of Jena for such equipment, the

Army and Navy generally contracted with Bausch & Lomb for sample Zeiss military optical instruments (R. 28); that in such cases the prices quoted to Bausch & Lomb were determined independently by Carl Zeiss of Jena, and the contract prices between the Army and Navy and Bausch & Lomb were determined independently by the latter, Bausch & Lomb assuming responsibility for the satisfactory character and performance of the instruments (R. 28); that Bausch & Lomb paid Carl Zeiss of Jena nothing beyond the net amount of its quotations for these instruments (R. 28); that on one occasion in 1927 a contract was made between the United States Government and N. V. Nederlandsche Instrumenten Compagnie of Venlo, Holland, a subsidiary of Carl Zeiss of Jena, for the importation of a sample military optical instrument; that the contract price for such instrument included 5%, which was paid to Bausch & Lomb as exclusive American licensee under the patents of Carl Zeiss of Jena, covering this instrument; that it was understood that Bausch & Lomb would assist the United States authorities in straightening out whatever questions might arise regarding the design and performance of the instrument and would undertake the manufacture of such further instruments of similar character as might be desired by the United States Government (R. 28-29); that "at no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party" (R. 29); that the allegations in paragraph "Eleventh" of

the complaint are utterly false and untrue* (R. 29); moreover, the affidavit flatly denied that at various undisclosed times the defendants presented to various officers of the United States bids, claims, invoices, bills, vouchers, etc., against the United States, knowing that such documents were excessive, false, fictitious and fraudulent, and stated that neither Bausch & Lomb nor anyone on its behalf had submitted any claim upon or against the Government of the United States, or any department or officer thereof, which was false, fictitious or fraudulent in any respect (R. 29), and that "the sweeping character of this denial does not depend on the form of the words of the charge or of this answer"** (R. 29-30).

In his affidavit, Mr. Eisenhart thus, in effect, testified, on personal knowledge, precisely as he could and would have testified, if on the stand,*** as to what Bausch & Lomb had done and had not done. Thus, he effectively demonstrated that the charges had no foundation in fact and placed upon the petitioners the onus of producing some admissible evidence tending to support any of the material charges which had been made if they chose to controvert the facts so established.

Petitioners found themselves in a difficult position of

---

*The substance of the allegations of paragraph "Eleventh" of the complaint are carried over into paragraph "Fourteenth" of the so-called amended complaint (R. 82); they contain the essence of petitioners' charges as to misrepresentations in connection with bids.

** This denial is equally applicable to the allegations of paragraph "Fifteenth" of the amended complaint, which contains the charge of submission of fraudulent claims. Petitioners say that the statements in the affidavits were not broad enough, but, if broad enough, that they were not in accord with some of the allegations in the anti-trust proceedings (Pet. Br., pp. 18-21). On the contrary, they were as broad as the charges in the complaint and in the so-called amended complaint; as we shall see, they could not be disregarded on the strength of the inadmissible proceedings on which petitioners rely.

*** "Let the affidavit follow substantially the same form as though the affiant were testifying in court." Hon. Bernard L. Shientag, *Summary Judgment* (The Viking Press, 1941), page 49.

their own making. To have filed no counter-affidavit might have been fatal as the court would have been justified in considering this failure as an admission that no issues of fact remained. *Allen* v. *Radio Corporation of America*, 47 F. Supp. 244 (D. Del. 1942). On the other hand, the requirements of Rule 56(e) presented an insurmountable obstacle, since they had no personal knowledge either of facts or of specific admissible evidence which would support their charges.

They made a colorable but vain attempt to extricate themselves from the dilemma which the salutary provisions of Rule 56 presented to them, in common with all litigants in the Federal Courts, by responding with an affidavit of petitioner Thebner, one of the two lawyer plaintiffs who brought this action (R. 64-76), which was adopted by petitioner Brensilber, his co-plaintiff (R. 77). The affidavit in substance merely incorporated the following papers from the court files in the anti-trust proceedings: the indictment (R. 86-111); the Government's bills of particulars (R. 112-193, 194-211); the equity complaint (R. 212-242), and the consent decree (R. 243-248). The petitioners consigned these papers to the District Court's attention with the conclusory statement that the complaint and proposed amended complaint were not sham and false as the incorporated papers supported the ultimate facts and conclusions therein set forth (R. 64-65). Significantly, the affidavit failed to point out any specific admissible evidence in support of that conclusion.

A consideration of each of the anti-trust proceeding papers incorporated by reference into the affidavit discloses that petitioners failed to comply with the plain mandate of Rule 56(e) of the Federal Rules of Civil Pro-

cedure, that a party must utilize admissible evidence if he would raise genuine issues of fact by affidavit.*

The indictment would not be admissible in evidence as proof of the truth of the facts therein alleged and the fact that the defendants pleaded *nolo contendere* thereto did not make it so (*Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn., 1939), aff'd 119 F. (2d) 747, cert. den. 314 U. S. 644; *Barnsdall Refining Corporation* v. *Birnamwood Oil Co.*, 32 F. Supp. 308 (E. D. Wis., 1940)). In the *Twin Ports Oil Co.* case, *supra*, the plaintiff, in a civil anti-trust action had incorporated into the complaint an indictment and judgment entered on a plea of *nolo contendere*. The defendants moved to strike such matter from the complaint. The Court ordered all references to the proceedings which the Government had brought stricken as immaterial, irrelevant and prejudicial. In so holding, the Court indicated that:

> "• • • A judgment entered on a plea of nolo contendere does not constitute a finding on any fact question. *It does not establish the truth of the facts set forth in the indictment.* • • •" (p. 378; emphasis supplied)

The Government's bills of particulars, being merely amplifications of the criminal pleading and self-serving,

---

* Since its adoption the courts have repeatedly applied the plain requirements of Rule 56(e) and have consistently held that only admissible evidence in affidavits may be considered. So it has been held that evidence should be disregarded when subject to the following objections: incompetency (*Banco de Espana* v. *Federal Reserve Bank*, 114 F. (2d) 438 (C.C.A. 2, 1940)); parol (see *Fox* v. *Johnson & Wimsatt Inc.*, 31 F. Supp. 64, aff'd 127 F. (2d) 729 (App. D.C. 1942)); hearsay (*Seward* v. *Nissen*, 2 F.R.D. 545 (D. Del. 1942), *supra*; *Boerner* v. *United States*, 26 F. Supp. 769 (E.D.N.Y. 1939); see *Edward B. Marks Music Corp.* v. *Stasny Music Corp.*, 4 Fed. Rules Serv. 773, (S.D.N.Y. 1941), *supra*); failure to comply with the best evidence rule (see *Town of River Junction, et al.* v. *Maryland Casualty Company*, 110 F. (2d) 278 (C.C.A. 5, 1940)). Affidavits not based upon personal knowledge are likewise to be disregarded (*Hummel* v. *Wells Petroleum Company*, 111 F. (2d) 883 (C.C.A. 7, 1940); *Person* v. *United States*, 112 F. (2d) 1 (C.C.A. 8, 1940), cert. den. 311 U. S. 672).

are equally inadmissible as such. The function of such particulars is to specify details of general allegations and to limit proof at the trial (*United States* v. *Adams Exp. Co.*, 119 Fed. 240 (S. D. Iowa, E. D. 1902); *Kettenbach* v. *United States*, 202 Fed. 377, 383 (C.C.A. 9, 1913); *United States* v. *McKay*, 45 F. Supp. 1001, 1002 (E. D. Mich. S. D. 1942); *United States* v. *Kessler*, 43 F. Supp. 408, 412 (E. D. N. Y. 1942)). They could not be used on petitioners' behalf as evidence of the truth of the matters therein set forth. *Cf. Roscoe Lumber Co.* v. *Standard Silica Cement Co.*, 62 App. Div. 421, 70 N. Y. Supp. 1130 (1901); *Seim* v. *Krause*, 13 S. D. 530, 83 N. W. 583 (1900); *Hesser-Milton-Renahan Coal Co.* v. *La Crosse Fuel Co.*, 114 Wis. 654, 660, 90 N. W. 1094, 1096 (1902); *Belote* v. *O'Brian's Adm'r.*, 20 Fla. 126, 138 (1883); *Abbey Sales Company, Inc.* v. *Johnson*, 262 App. Div. 1021, 30 N. Y. Supp. (2d) 295 (1941).

Moreover, the equity complaint and consent decree, entered into before any testimony had been taken, would be equally inadmissible for such purposes. Section 5 of the Clayton Act* provides that final judgments in Government criminal or equity proceedings under the anti-trust laws shall for certain purposes make out a *prima facie* case in treble damage suits under such laws, but expressly excepts "consent judgments or decrees entered before any testimony has been taken." This statutory exception is simply a reiteration of the law which had theretofore prevailed. As was said by Mr. Justice Holmes in *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 248 U. S. 55, 63 (1918), an action instituted before the Clayton Act was passed:

> "The next matter requires but a few words. The plaintiff offered in evidence decrees in a pro-

* Act of October 15, 1914, c. 323, §5, 38 Stat. 731, 15 U.S.C. §16.

> ceeding by the Government finding the DuPont Company guilty under the Sherman Act of an attempt to monopolize. 188 Fed. Rep. 127. These, of course, were held inadmissible. * * *"

Consequently, the stipulation in the consent decree which these respondents entered into "that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States" (R. 243), was effective and neither the pleading nor the decree constituted admissible evidence.

These objections to an attempt to use the anti-trust pleadings and proceedings as a substitute for the admissible evidence which Rule 56(e) required petitioners to adduce are not technical but fundamental. Petitioners have simply attempted to lift their own allegations, of whose truth they had no personal knowledge, by the bootstraps of other allegations of which they likewise had no knowledge and which they could not have used upon a trial. Repetition of allegations cannot give them probative value.

Out of the mass of documents which petitioners have brought into the record, all of which, as we have so far discussed them, were plainly inadmissible as evidence, the only remaining material to be examined are the exhibits annexed to the Government's bill of particulars. Only those exhibits have any resemblance to evidence. Leaving aside for the moment any question of materiality or relevancy, they are the only documents which could possibly be thought to bind these respondents.

(b) The record shows no competitive bidding requirement and no thwarting thereof; the exhibits raise no genuine issue of fact.

Since the decision of this Court in *Marcus* v. *Hess* was handed down, the petitioners have, for the first time,

taken the position that the heart of their case is that these respondents were engaged in a conspiracy with Zeiss of Jena to thwart the competitive bidding process.

It appears to be their claim that Carl Zeiss of Jena and Bausch & Lomb were competitive bidders, that Zeiss, pursuant to an agreement with Bausch & Lomb, systematically abstained from competitive bidding and when it did not abstain from such bidding made colorable protective bids at increased prices fixed by Bausch & Lomb, all of which resulted in Bausch & Lomb procuring Government contracts at excessive prices. The evidence in this record does not support any such contention.

Despite the fact that petitioners alleged that respondent Bausch & Lomb made fraudulent sales to the United States Government totaling many millions of dollars over a period of twenty years, the Government's bills of particulars, the result of an exhaustive investigation, and apparently petitioners' sole source for any detail of their general charges, allege only one sale by Bausch & Lomb to the United States Government and only four other instances of any dealings or communications involving the Government in connection with Zeiss instruments. Of these, only one is supported by an exhibit, Exhibit U. With the possible exception of the proposed transaction mentioned in that exhibit, the other references are mere allegations in the Government's bills of particulars, inadmissible as evidence for the reasons stated above*. However, we examine those allegations in a footnote to show that they do not support petitioners' claims.**

---

* The agreements of 1921, 1925 and 1926 are annexed to the Government's bills of particulars as Exhibits A-F (R. 145-161), and to the Government's equity complaint as Exhibits A-D (R. 228-242). They will be considered in the last section of this Point (*infra*, p. 29); as we shall show, they do not aid petitioners.

** The first instance concerns the importation, on or about September 15, 1928 or 1938, of a stereo-telemeter (range finder) by Bausch & Lomb from Carl Zeiss of Jena, which was sold by Bausch & Lomb to the United States Government for approximately $24,460 (R. 118-119, 142-143). It is included

Thus, the only possibly admissible evidence in this record giving any detail of a potential transaction with the United States is Exhibit U (R. 188-192). Unless that provides the foundation for petitioners' present theory, their argument finds no support in this record. The actual agreements between Zeiss and Bausch & Lomb, examined *infra*, do not support their theory.

Exhibit U (R. 188-192) was cited by the Government in its bills of particulars as an instance wherein "Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb • • •" (R. 138). It is a copy of a letter, dated March 7, 1928, from Bausch & Lomb to Carl Zeiss of Jena. It appears therefrom that the American Embassy in Berlin, presumably on behalf of the Navy Department, had inquired at Nedinsco (an affiliate of Zeiss) with regard to the supply of three Zeiss periscopes with accessories of a new type, in which it appears that the Navy Department had not been previously interested. Zeiss was apparently of the opinion that if the Embassy could be interested in the instruments it might mean some business for Bausch & Lomb in the future, and cabled the terms of sale:

---

in the bills of particulars for the sole purpose of supporting the jurisdiction of the District Court for the Southern District of New York in the anti-trust proceedings (*Cf.* R. 118-119, 142-143). There is no indication whatever that this transaction was improper. The Government did not claim it to be and the respondents' affidavits establish its propriety (R. 28).

The second, in 1929 (R. 138), was alleged by the Government to be one of three instances of Zeiss' refusal to sell military optical instruments in the United States unless Bausch & Lomb consented. Only this one involved the Government. There is no evidence whatever that a "protective offer" was involved or that the refusal involved fraud. We point out, *infra*, that consent of an exclusive licensee was appropriate.

The third, fourth and fifth (R. 138-139) are alleged to be instances in which Zeiss offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb. Of the total of four such cases given, one does not concern the Government. Item "(i)" refers to Exhibit U (R. 188-192) in support thereof and will be considered in the text. There is no indication in items "(ii)" and "(iii)" that "protective offers" by Carl Zeiss of Jena were involved, and the Government, in the anti-trust proceedings, made no claim that they did. Again, consent of the exclusive licensee was a normal precaution.

"• • • Nedinsco will quote with date of delivery usual foreign countries dollars price delivered f.o.b. Rotterdam 10% for you • • •."

As appears from the copy of the cablegram of March 7, 1928 (R. 191), the commission was included within the usual foreign countries price.

This exhibit lends no support to petitioners' present theory of their case. Far from showing that the inquiry bore relationship to a quest for competitive bids, it appears to have been an inquiry for a quotation on an instrument for which no similar inquiry had been made of Bausch & Lomb. Since the price to be quoted was the "usual" price which Nedinsco quoted foreign countries and included a commission of 10% for Bausch & Lomb (R. 188), the exhibit directly negatives the petitioners' contention upon which their theory of the case depends, that such a quotation, if made, involved a "protective bid" or any excessive price. Finally no consummation of even this transaction is reflected in the bill of particulars (*Cf.* R. 142-143), and the respondents' affidavits indicate that it did not in fact materialize (R. 28-29).

Even if the transaction had been consummated, the payment of the proposed commission to Bausch & Lomb would appear to have been entirely consistent with the rights which Bausch & Lomb had as exclusive licensee. Fraud could not possibly be inferred.

Petitioners' attempt to invoke the *Marcus* case and the other authorities dealing with competitive bidding upon which their argument is predicated must fail. There is no evidence in this record to show that military optical instruments were subject to competitive bidding requirements, that Bausch & Lomb and Zeiss were asked to submit competitive bids, or that the Government considered

Zeiss a potential competitive bidder. There is nothing to show that Bausch & Lomb had a monopoly in this field. These omissions do not appear to be inadvertent; many factors which may be noticed point to the conclusion that military optical instruments were not subject to competitive bidding requirements and that Zeiss was not a potential competitive bidder. It would seem that as "ordnance," military optical instruments were not within the requirements of competitive bidding.* Furthermore, a long-standing legislative policy emphasized the desirability of purchasing such equipment from American

---

* Military optical instruments, being of a highly technical and specialized nature, are in a different category from much of the material which the Government purchases. Neither the Army nor the Navy is required to seek competitive bids on "ordnance." Webster's New International Dictionary, 2d Ed., defines "ordnance" as including range finders, etc., and the definition obviously is broad enough to cover all military optical instruments as defined in the complaints (R. 4, 80).

The United States Government Manual, Fall 1942, page 248 in describing the function of the Navy Bureau of Ordnance states:

> "The Bureau of Ordnance, under the direction of the Secretary of the Navy, is charged with and responsible for the design, manufacture, procurement, maintenance, issue, and efficiency of all offensive and defensive arms and armament * * * and, except as specifically assigned to other cognizance, optical and other devices and material for the control of guns, torpedoes, and bombs."

Among the statutes exempting ordnance from requirements of competitive bidding are:

As to the Navy, Rev. Stat. §3721, 34 U.S.C., §569, provides in part:

> "The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, * * *."

In 1897 the Attorney General rendered the opinion that under R.S. §3721, the Navy Department could contract with an American concern for the manufacture of rifles without competitive bidding. 21 Ops. Att'y. Gen. 577.

As to the Army, the Act of May 11, 1908, c. 163, 35 Stat. 106, 125, 10 U.S.C. §1199, provides:

> "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

See also Act of March 2, 1901, c. 803, 31 Stat. 895, 905, Act of June 30, 1902, c. 1328, 32 Stat. 507, 514, 10 U.S.C. §1201.

sources.* Finally, it is hardly conceivable that the United States military authorities would have looked to Carl Zeiss of Jena, or any other foreign concern, as its source of supply for such vitally important equipment as the range finders which control gunfire on our ships any more than they would have had our battleships constructed on foreign ways. The particulars furnished by the Government, with complete facilities for investigation, reflect, at

---

* Aside from the public policy affecting military optical instruments, during the past twenty years, at least, various Army and Navy appropriation acts have contained provisions manifesting the existence of a "Buy American" policy. The Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450, provided in part:

> "That in the expenditure of appropriations in this Act the Secretary of the Navy shall, unless in his discretion the interest of the Government will not permit, purchase or contract for, within the limits of the United States, only articles of the growth, production, or manufacture of the United States, notwithstanding that such articles of the growth, production, or manufacture of the United States may cost more, if such excess of cost be not unreasonable."

Identical language is to be found in the following Navy Department appropriation acts: Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2; Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540; Act of March 15, 1934, c. 69, 48 Stat. 403, 421; Act of June 24, 1935, c. 291, 49 Stat. 398, 418.

In his Annual Report for 1924, contained in the Annual Reports of the Navy Department, at page 272, the then Chief of the Bureau of Ordnance, Rear Admiral C. C. Bloch, stated that the Bureau advocated the policy of purchasing all high grade optical instruments in this country.

Army appropriation acts containing provisions of similar import are: Act of June 30, 1921, c. 33, 42 Stat. 68, 90; Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754.

Furthermore, this "Buy American" policy is given general application by the Act of March 3, 1933, c. 212, 47 Stat. 1489, 1520, 41 U.S.C., §10a. (See also Act of June 30, 1914, c. 130, 38 Stat. 392, 399, 34 U.S.C., §568.)

The policy of encouraging the development of domestic sources for military optical instruments was long ago also advocated in Great Britain. See Instructor-Commander Baker, *Optical Instruments in the Fighting Services*, Journal of Scientific Instruments, Vol. II, page 380 (Cambridge (Eng.) University Press, 1925):

> "The modern utilization of optical apparatus for fighting purposes had its beginning about thirty years ago and is consequent upon improvements in guns and the increased ranges at which actions could be fought. Optical instruments as aids to vision became necessary since the precision of laying the guns becomes more important at the greater ranges. In consequence, the whole series of optical instruments now used, gun-sights, rangefinders, spotting binoculars, etc. has had to be evolved slowly and adopted after service trials, and they have had by this time a profound effect upon the tactics of war. To such an extent are the ships of the Fleet now dependent upon optical instruments that it is no exaggeration to say that without them, and without an efficient industry for their pro-

most, only infrequent inquiries for Zeiss sample instruments and they negative competitive bidding. It may be assumed that any regular course of dealings would be reflected therein. This absence of proof confirms the natural conclusion which military realities would seem to compel. The defects in this record, which make petitioners' present contentions academic, in the very nature of the subject matter, appear to be irreparable.

---

duction, our Navy would be at the mercy of an enemy inferior in guns and ammunition.

The equipment of the Services with 'Optical Munitions' is at the present time very good. It is without the slightest question better than any other country gets from its native optical industry. We are better provided with optical glass, we have better optical designs, we have better instrument manufacture. Improvements still go on; new instruments to cope with new conditions of warfare are constantly needed, and it is of vital importance for national safety that this country should not lag behind in the maintenance of the efficient optical industry that we now possess.

Not only are service instruments very good of their class, but, what is frequently not realized, they rank among the finest examples of scientific instruments of precision. Obviously in a public journal, detailed descriptions of service instruments cannot be given but anyone who has any doubt regarding their high scientific character has only to think of the rangefinder, an instrument which determines ranges by measurement of an angle to fractions of a second of arc and has to function satisfactorily, not in the constant temperature room of a laboratory, with infinite precautions to avoid vibration, but in the control tower of a ship at sea subject every minute to violent concussion from salvos of big guns.

In order that the optical instrument industry may remain in a satisfactory condition to serve the Navy, Army and Air Force, it is imperative that it should possess a flourishing civilian trade so as to keep a sufficient number of skilled workmen constantly employed. In service instruments above all others the high quality of the precision demanded necessitates skilled hand labour, particularly for optical grinding and polishing. Such labour cannot be improvised on the outbreak of war. In a few cases men require two or three years' training and must be kept constantly at work or they lose their touch. The requirements of the Services in peace time are quite insufficient to keep an adequate number of men engaged and unless the instrument-making firms in the country can keep such men employed on similar work, such as photographic lenses, binoculars, microscopes, etc., national safety will be very seriously menaced. There is, unfortunately, still a persistent but erroneous impression, particularly in scientific circles, that to obtain the best optical apparatus it must be bought abroad. This belief, when probed to the bottom, is usually found to rest on the fact that Abbe's researches into optical glass made the design of the apochromat microscope objective possible. Much has taken place since those days and the purchase of foreign optical goods at the present time is doubly foolish: our vitally necessary industry is starved and the purchaser gets an inferior article."

It is therefore unnecessary to consider cases such as *McMullen* v. *Hoffman*, 174 U. S. 639 (1899) and *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573 (1940), among others cited in petitioner's brief, which involve agreements affecting competitive bidding. Furthermore, none of these decisions involved the special requirements of the provisions of the Informer's Act.

(c) On the facts of record respondents were entitled to judgment as a matter of law.

As it appears from the foregoing discussion that the admissible evidence in this record, so far, entirely fails to support a claim under the Informer's Act, there remains for consideration only the agreements between Zeiss and Bausch & Lomb.* Some reference to the terms of the statute is necessary in that connection.

Revised Statutes, §5438, limits the right to bring an informer's action to three states of fact. It must appear that the defendant is one:

> "(1) who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
>
> (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim,

* While the court below did not find it necessary to refer, in its brief *Per Curiam* opinion, to the details of the record which we have thus far analyzed, it is fair to assume that the inarticulate premise of its discussion of the agreements was that there was nothing else in the record which could block summary judgment for respondents. As we shall see, the court below found nothing in the agreements to raise an issue of fact under Rule 56 which would justify denial of the motion for summary judgment. On the contrary, the court properly recognized that "The action is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 269).

> makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or
>
> (3) who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * *."

Petitioners appear to rely on the first and third clauses. The record, on motion for summary judgment, will not support a claim under any.

Bausch & Lomb entered into an agreement with Carl Zeiss of Jena in 1921 (R. 145-150); this agreement was modified twice in 1925 (R. 151-2, 153-156). The 1921 agreement, together with the 1925 amendments, were revoked by the provisions of the agreement entered into in 1926 (R. 157-161). The "protective offer" provision, to which petitioners attach much weight, was included only in the 1925 amendments, and this, like all other terms of the 1921 and 1925 agreements, effectively ended in 1926. In the teeth of the agreements, and the statements in the affidavits that the 1926 agreement in terms revoked the earlier agreements, petitioners argue that the parties did not mean what the agreements say and that, in fact, the protective offer provision continued after 1926. In support of these allegations, they point to no exhibits which refer to protective offers after 1926 (see footnote Pet. Br. p. 33) and to none which is not consistent with the performance of the 1926 agreement. It appears from respondents' affidavits (R. 17-33) that at no time, even when the 1925 agreements were in effect, was the pro-

tective offer provision ever invoked in any transaction involving the Government. No exhibit even suggests that it was.

It is established by the respondents' affidavits that, when Bausch & Lomb sold military optical instruments to the United States Government which it had manufactured under the rights granted to it by Carl Zeiss of Jena, it alone determined the price to be charged the Government; that, when Bausch & Lomb imported Zeiss military optical instruments for resale to the United States Government, Zeiss alone determined the price which it would charge Bausch & Lomb, and Bausch & Lomb independently determined the price which it would charge the Government (R. 28). There is no dispute that the 1926 agreement required payment to Zeiss of certain royalties for the patent and other rights granted to Bausch & Lomb by the 1926 agreement. These were the only payments ever made to Zeiss by Bausch & Lomb in connection with any transaction with the United States (R. 28). Petitioners do not appear to challenge these royalty payments, nor could they.

On the basis of the facts constituting admissible evidence, respondents were clearly entitled to judgment as a matter of law, since there is no basis for a conclusion that the 1926 agreement was a violation of the Informer's Act and none that any claim based on a sale to the United States Government of military optical instruments was false or fraudulent.

Since the 1921 and 1925 agreements were effectively terminated by the 1926 agreement and there is no evidence of the use of the "protective offer" provision of the 1925 agreement in any transaction with the United States, and the dates of those agreements are, furthermore, long before the bar of the six-year statute of lim-

itations (R. S. §3494, 31 U.S.C. §235), it seems unnecessary to consider those agreements in detail. By this omission we do not concede that those agreements were within the statute.*

On this record, petitioners' rights must depend on the 1926 agreement, and it is entirely clear that this agreement does not resemble the kind of agreement at which the statute is aimed. The effect of the agreement was improvement of military optical instruments for the benefit of our armed services (R. 30)—not fraud upon this Government. Bausch & Lomb had early been encouraged to develop its military optical manufacture by the United States Navy so that our Government would have the advantage of a domestic source of high quality with the benefit of Zeiss' advances.** And the United States re-

---

* A few comments on the 1921 and 1925 agreements may, however, be made. Petitioners treat the 1921 agreement as if it had no basis other than some improper restrictions on sales to the United States Government. When Section 3 thereof (R. 147) is examined, it is evident that the reference "to the United States" is a geographical reference, complementary to the reference to sales "to countries outside of the United States of America." The parties obviously contemplated that the market for such instruments would include purchasers other than the Government (see paragraph 2, R. 146). An examination of the entire agreement indicates that it was, in essence, a layman's version of an exclusive license to Bausch & Lomb under Zeiss' American patents and processes. Aside, perhaps, from the restriction on Bausch & Lomb's sales abroad, its legal consequences would appear to be the same as those of any other exclusive license. The "protective offer" provisions of the 1925 amendments appear to have been mere implementations of the provisions of the 1921 agreement. The 1925 agreements did not require that either party should make protective offers whenever an inquiry was received from a purchaser in the territory reserved to the other. The party whose exclusive territory was involved had the option of requiring the making of a protective offer. There is no evidence whatever that Bausch & Lomb ever required Zeiss to make a protective offer on any transaction with the United States Government, and, thus, that the protective offer provision ever could have affected the transactions between Bausch & Lomb and the United States Government. The admissible evidence in this record is squarely to the contrary (R. 29).

** See Commander Cleary, U. S. Navy Member, *Range Finders and Range Finding*, Journal of American Society of Naval Engineers, Volume 32, p. No. 1, pp. 1-37 at pages 3-4 (Feb. 1920):

> "Some years ago, as a result of the wise policy of the fire control officer in the Bureau of Ordnance, Lieutenant Commander H. B. Price and the Chief of the Bureau, Rear Admiral N. E. Mason, the Bureau gave every aid and encouragement to the Bausch & Lomb Optical Company of Rochester, N. Y., to establish a range finder department.
>
> The Bausch & Lomb Optical Company was especially well fitted for this development work, being, at that time, the only manufacturer in

ceived these benefits. Fundamentally, the 1926 agreement gave Bausch & Lomb the exclusive right to manufacture and sell in the United States under the inventions and American patents of Carl Zeiss of Jena in the military optical instruments field and, in addition, the advantage of its research in that field. In effect, Bausch & Lomb became the exclusive distributor in this country of Zeiss military optical instruments and instruments manufactured by Bausch & Lomb pursuant to the inventions, American patents, and technique of Zeiss.

In so far as any exhibit attached to the bills of particulars (see Pet. Br., footnote, p. 33) indicates that Zeiss sought the consent of Bausch & Lomb in the territory where the latter was exclusive licensee or that Bausch & Lomb sought consent of Zeiss in territory where it had no license, this procedure seems consistent with the legal position of the parties under the 1926 agreement. No secret or mysterious understanding for continuance of

---

the United States with any extended experience in supplying optical instruments for the Bureau of Ordnance; in addition, the Bausch & Lomb Company was closely connected with the famous optical firm of Carl Zeiss of Jena, Germany, the foremost scientists in the optical world. A great part of the researches and developments of the Zeiss works thus became available for the use of the Bureau of Ordnance. The good faith and confidence of the Bausch & Lomb Company were shown in their first contract with the Bureau of Ordnance, in which the Bureau's acceptance of the range finder was conditioned on their being at least as accurate as any known instrument of equal base length.

The Bureau's encouragement of the Bausch & Lomb Company resulted in the establishment in the United States of a thoroughly equipped range finder factory as a source of supply in time of hostilities.

The value of a range finder establishment located in the United States has been shown by the present war which has prevented our purchasing any range finders abroad.

In time of peace, there are the advantages of efficient inspection during manufacture, of quick repair to damaged instruments and of experience and training for many officers and men who have had instruction in the Bausch & Lomb factory.

Our present range finders embody several new and valuable features, some of these due to The Carl Zeiss Company, others to the Bausch & Lomb Company."

See also: *The Manufacture of Optical Glass and of Optical Systems*, Ordnance Dept. Doc. No. 2037, pp. 5-15, 287-298 (Government Printing Office 1921).

the revoked agreements can be read into such communications.

In *Littlefield* v. *Perry*, 21 Wall. 205 (1874), and *Excelsior Wooden Pipe Company* v. *Pacific Bridge Company*, 185 U. S. 282 (1902), this Court indicated that an exclusive patent licensee may sue the owner of the patent who has infringed. Moreover, it has been held that the holder of an exclusive patent license to make and vend a patented article in the United States may obtain an injunction to prevent sales in that territory by the owner of the patent. *Benson* v. *Crane*, 257 Ill. App. 71, 91 (1930); *Sherrill* v. *Alabama Appliance Co., Inc.*, 240 Ala. 46, 197 So. 1 (1940), and that the holder of certain exclusive patent rights covering certain states may sue for breach of contract the owner of the patent who has invaded his territory and his exclusive right to sell in the same. *Manning* v. *Galland-Henning Pneumatic Malting Drum Mfg. Co.*, 141 Wis. 199, 203, 204; 124 N. W. 291, 292, 293 (1910).

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, 402 (1911), this Court stated:

> "• • • The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle* v. *Park*, 131 U. S. 88. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236."

See also *John D. Park & Sons* v. *Hartman*, 153 Fed. 24, 30 (C.C.A. 6, 1907).

Under these authorities it is clear that for Zeiss to have made a sale in the United States of articles covered by the 1926 agreement without the consent of Bausch &

Lomb might have exposed it to suit for infringement or injunction. It is impossible to conceive how such an arrangement could constitute a fraud on any purchaser. It would be subversive of daily commercial practice and a threat to all patents and patent licenses to say that a fraud has been perpetrated on the purchaser from a licensee because the patentee, *ipso facto*, cannot compete in that particular territory.

The natural inference is that the reason for the consents sought by Bausch & Lomb when it considered sales to purchasers who might use patented products outside the United States was that only by such consents could Bausch & Lomb make sure that its prospective customers would be protected against claims of infringement by Zeiss under foreign patents.

But whether the inferences suggested are correct or not, it is apparent that the few documents which contain evidence of consents sought by one party or the other were not of a character which a court could accept as evidence of a violation of the Informer's Act by Bausch & Lomb. In the face of the positive statements in respondents' affidavits, which explicitly refuted any claim of false bids or fraudulent claims, no genuine issue of fact could be created by occasional communications, not involving the United States at all. The difficulty in drawing the strained and unlikely inference which petitioners seek to draw from such communications is emphasized by the elaborate hypotheses and confusing suppositions to which petitioners are driven. (See Pet. Br. p. 33, final paragraph of footnote.)

It is, of course, irrelevant to the question here whether any of the agreements were open to attack under the anti-trust laws which is what the court below meant by its reference to a "wrong". This is made perfectly obvious by the Court's statement "* * * it appears beyond

question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded *nolo contendere,* and that this in turn rested upon the contracts" (R. 269). Its opinion plainly means that, even taking the best case from petitioners' point of view and assuming that the agreements, or one of them, gave Bausch & Lomb an advantage in the form of a monopoly, which was unlawful under the anti-trust laws, it did not at all follow therefrom that each and every sale made thereafter was *ipso facto* a fraud on a purchaser, including the United States, in short, that every sale by a monopolist is not, *per se,* fraudulent. It then held that in such a case some additional factor such as a misrepresentation would be required in order to found liability under the Informer's Act and concluded that no such factor existed here.

Although it was not necessary for the Court to go that far in its assumption, since there was neither evidence nor claim that Bausch & Lomb had a monopoly, still the conclusion reached by the Court as to the consequences, if there had been a monopoly, was undoubtedly correct. Cf. *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 252 (1925); *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.,* 236 U. S. 165 (1915); *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.,* 32 F. Supp. 314, 315, 316 (E. D. Wis., 1940).

POINT III

The Government's Brief as *amicus curiae* in support of the petition poses a question which on this record is hypothetical and the criticism of the construction by the court below of R. S. §5438 as requiring deceit appears to be unfounded.

After our Brief in Opposition was filed, the Solicitor General filed a brief *amicus* in support of the petition, upon which we have previously had no opportunity to comment. In that brief, the Solicitor General contended that when the court below held that the fraud contemplated by R. S. §5438 was fraud in the accepted sense of deceit, it had taken too narrow a view of the scope of the statute. He apparently argued for a construction which would not require any misrepresentation of fact. The limits of the broad construction sought were not delineated. He contended that the statute should be construed so that, "a claim based on a contract secured as a result of any conspiracy to eliminate competitive bidding, no matter by what means it is carried out, is fraudulent within the meaning of R. S. §5438."

From our earlier analysis of the record, it appears that the question thus posed by the *amicus curiae* brief is hypothetical. No genuine issue has been raised as to the existence of the requirement of competitive bidding (much less that there was a conspiracy between all or any potential competitive bidders on military optical instruments) in any transaction in which Bausch & Lomb or Carl Zeiss of Jena may or could have been involved with the United States Government. Considerations which may be noticed (*supra*, p. 26) point to the conclusion that they were not actual or potential competitive bidders in dealing with

ordnance procurement officers and technicians of the War and Navy Departments, and that, accordingly, their agreements could not be or be construed as conspiracies to eliminate or to thwart competitive bidding. Furthermore, the opinion of the court below did not so construe them. So whatever the merit of the Solicitor General's contention might be in a proper case, it is not one which this Court should or need consider in this case. Since, however, the Court may wish to consider the question of construction of the Informer's Act adverted to by petitioners and the Solicitor General, we submit certain considerations indicating that the construction of the statute below was correct.

(a) The statute was designed and passed to prevent deceitful practices, to prevent "cheating" the Government; deceit is the essence of the offense.

The general fraud legislation of 1863, of which the Informer's Act is a part, was enacted for the purpose of coping with a definite class of frauds which had been perpetrated upon the Government during the Civil War and for which there existed no adequate legal remedy. The legislative history reflects the types of wrong with which Congress was concerned.* The Senate sponsor summarized the purpose of the bill as one to protect against those who would "cheat the United States" (*Marcus* v. *Hess, supra,* p. 544). The element of deceit appears to have been present in the transactions with which Congress was concerned; it would seem to be involved in any "cheat." As the court below observed, deceit is the

* The bill as originally introduced is set out with Senator Howard's discussion, at pp. 953-954, Cong. Globe, 37th Cong., 3rd Session. Legislative Committees had compiled much evidence of the existence of transactions in which the Government had been the victim of deceits. *"Government Contracts,"* Report No. 2, 2 Vols., 37th Cong., 2nd Session (1862); *"Government Contracts,"* Reports Nos. 49 and 50, 37th Cong., 3rd Session (1863).

normal content of the words "false," "fictitious" and "fraudulent" when used in the juxtaposition of the statute (R. 268). There is no reason to suppose that the content of the words differs in the several clauses of the statute. The Circuit Court found that there was no misrepresentation express or implied on which to base the conclusion that there was deceit in this case (R. 268).

(b) The statute has been construed as being limited to deceitful practices.

Until the spate of cases which began with the verdict for plaintiff in *Marcus* v. *Hess,* the decisions under the Informer's Act were few and far between. It has rarely been necessary for the courts to construe the specific wording of statutes stemming from R. S. §5438; in most cases it was quite plain that the conduct involved fell within or without any reasonable construction. There are two cases (other than the decision in this case), both decided by the same judge, which hold that the element of deceit is required thereunder. *United States* v. *Goggin,* 1 Fed. 49 (C.C.E.D. Wis., 1880); *United States* v. *Green,* 26 Fed. Cas. 32, No. 15,257 (C.C.E.D. Wis., 1879).

In *United States* v. *Goggin, supra,* the defendant was indicted under R. S. §5438 upon an allegation that he procured payment from the Government of a pension under a pension certificate procured by him upon false and fraudulent proofs. The objection was raised that the offense was not described with the certainty required by the law of criminal pleading. Following conviction, a motion in arrest was granted. In holding that the defendant was not sufficiently apprised of the nature of the charge against him, the Court said at page 53:

> "It was stated upon the argument that what is alleged in the indictment in regard to fraud in

> obtaining the pension certificate relates to the *evidence* of the offense, and not the offense itself; but it is not the presentation of the claim for payment which makes the offense, it is the presentation for payment of *a false or fraudulent claim,* and as no fraud can be committed but by deceitful practices, the particular deceitful practices by which the fraud is alleged to have been committed, or which makes the claim fraudulent, should be to such extent set forth as to make the fraud appear upon the face of the indictment."

Cf. *Bridgeman* v. *United States,* 140 Fed. 577, 594 (C.C.A. 9, 1905).

(c) The statute should be strictly construed and not set at large or treated as an additional sanction for the anti-trust laws.

In *Marcus* v. *Hess, supra,* this Court indicated that the provisions of R. S. §5438, to the extent that they have been incorporated into the Informer's Act, are to be strictly construed, when it said at page 542 (317 U. S. 537, 542):

> "• • • True, §5438 is criminal and for that reason in interpreting so much of its language as it shares in common with §3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment. • • •"

When the Act is so scrutinized it seems plain that it is to be construed as limited to conduct involving deceit. Any argument that the word "fraudulent", as used in the Informer's Act, has an unlimited significance would render unnecessary the inclusion in the statute of the

words "false" and "fictitious". On the other hand, familiar canons are given full effect when the words, "false, fictitious or fraudulent", or two of them, appearing together, are interpreted in the sense of deceit, which is their common denominator. *Cf. Seven Cases* v. *United States,* 239 U. S. 510, 517 (1916).

The first and second clauses of the Informer's Act refer to individual conduct involving the knowing use of false, fictitious and fraudulent claims and documents; the third clause brings in, not a wholly new class of offenders but only those who enter into agreements to defraud by obtaining the payment of false or fraudulent claims. The construction to be given to the third clause must, obviously, be consistent with that given to the others since they were all part of the same legislative plan for combatting closely related evils.

Unless the entire statute is construed in accordance with normal usage and common understanding, so that the citizen may be fairly warned of the conduct which is denounced, many difficulties arise. The broad and unconfined construction contended for by the Solicitor General would necessarily set the several provisions at large. Once the familiar meaning is abandoned to meet a hypothetical case which may never arise or which, if it arises, is very likely to involve evidence which would satisfy the normal requirements of the statute (as did the evidence in *Marcus* v. *Hess, supra*), the statute loses all quality of certainty. Such a construction imperils persons whose dealings with the Government in good faith may subsequently be brought into question on any ground, and introduces elements of indefiniteness which, in a penal statute, might raise grave doubts as to its validity. *Herndon* v. *Lowry,* 301 U. S. 242, 261 (1937); *United States* v.

Cohen Grocery Co., 255 U. S. 81, 89 (1921). Cf. *A. B. Small Company* v. *American Sugar Refining Company*, 267 U. S. 231, 239 (1925).

No such construction is needed to strike at genuine frauds, recognized and abhorred by all, the statute reaches them under the construction below; a construction going beyond such frauds, involves the importation into the statute of new standards and policies, the creation of new and unfamiliar offenses. Such expansion of the legislative scheme is appropriate only for legislative action where alleged evils may be considered in the light of actual conditions and the policy of changing rules prospectively and not retrospectively can be weighed. If the protection now afforded to the Government by the intricate forms and close supervision used by the Government's expert purchasing officers, the renegotiation laws and the other safeguards against abuses are now inadequate to take care of the hypothetical cases which appear to concern the Solicitor General, Congress should be asked to consider plugging that gap (Brief *amicus curiae* in support of the petition, p. 6). But the gap, if any, ought not to be filled by straining and remolding this statute on the basis of anything in this record or before the Court.

An unlimited construction which, without previous fair warning, introduces grave uncertainties into the dealings between the Government and its citizens, ought to be avoided. In *United States ex rel. Edelstein* v. *Brussell Sewing Machine Co. Inc.* (S. D. N. Y., so far unreported; printed as Appendix C), Judge Bright granted a motion for summary judgment to the defendants in an informer's suit on September 15, 1943, considering that *Marcus* v. *Hess, supra,* was inapplicable. In connection with this question of construction of the statute, Judge Bright said:

"* * * Nor, I believe, was it the intention of the statute to make dealings with the Government hazardous, should some one later conceive the notion that the Government had paid or contracted to pay too much. Certainly, under the circumstances shown here, there would be no fraud, as between merchants, manufacturers or buyers. On the Government side were presumably expert and informed procurement officers. The Government has received what is contracted for. And the only claim shown was for the stipulated price. If such transactions are within the condemnation of the statute, however construed, no one dealing with the Government could rely on any official's decision, no contract price would be final; in fact no contract would be of any value. Price and contract, and the informed judgment of purchasing officers, would always be subject to be set aside by informers at any time, upon claims of fraud such as here presented, and perhaps with even less semblance of merit."

Here the United States has had the benefit of the improvements in military optical instruments made possible by the arrangements between Zeiss and Bausch & Lomb. There is no evidence that the Government has paid excessive prices; the contrary appears from respondents' affidavits (R. 27-30). The purchase through Bausch & Lomb of Zeiss sample instruments (R. 28), the Zeiss patents in the military optical instrument field, the early encouragement to Bausch & Lomb so that the Government would have the benefit of a domestic source to which Zeiss technique was available (see footnote**, *supra*, p. 32), all point to the fact that the Government was not unaware of the substance of those arrangements. For this statute to be so construed, without any previous warning, as to

embrace old and long since terminated arrangements like those here involved, would be obviously unfair. Elements of doubt and suspicion would be created, reaching far beyond this case, at a time when no public interest could possibly be served by that result. The public interest is adequately protected by the decision below, for it is difficult to conceive of an actual conspiracy to stifle competitive bidding where the additional factor of misrepresentation could not be shown as it was in *Marcus* v. *Hess, supra.* No such conspiracy is reflected in this record.

The petition suggested that this statute should be construed as broadly as possible to provide an additional sanction for the anti-trust laws, the sanctions of which petitioners conceived to be inadequate. Any contention that the construction of the agreements by the court below, based on the charges in the anti-trust case, brings them within the Informer's Act is at bottom but another form of the same suggestion. The Informer's Act was passed long before the anti-trust laws were adopted. A penal statute cannot be extended by intendment to an offense not *in esse* at the time of its enactment. *Commonwealth* v. *Exler,* 243 Pa. 155, 89 Atl. 968 (1914). "And it was long ago ruled that a penal Act of parliament cannot be extended to things that did not exist when the Statute was made" *Commonwealth* v. *Wells,* 110 Pa. 463, 468, 1 Atl. 543 (1885). As late as 1941 an attempt was made to increase the penalties imposed by the anti-trust laws, and Congress has refused to enlarge them.* On the other hand this Court has said:

* Sen. O'Mahoney in 1939 sponsored a bill (S. 2719, 76th Cong., 1st Sess.) drastically to increase the civil and criminal liabilities for anti-trust infractions. The text of this bill is set out and discussed on page 8191 *et seq.* of the Congressional Record (76th Congress, 1st Session). This is the bill which was recommended for passage by the T N E C Report of 1941 (Cf. Petition for certiorari, p. 24). So far it has failed to pass either House.

> "The recent expressions of this court in *Tigner* v. *Texas*, 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation. Congress has not left us at large to devise every feasible means for protecting the Government as a purchaser. It is the function of Congress to fashion means to that end, and Congress has discharged this duty from time to time according to its own wisdom. Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 (1941).

Far from showing a disposition to enlarge the penalties for anti-trust violation or to extend the Informer's Act, Congress has recently indicated its determination to restrict the operations of informers. Repeal of the informer provisions was requested by the Attorney General in a letter to the Speaker of the House dated August 28, 1942 (included in House Report No. 263, 78th Cong. 1st Sess.). The House passed a bill (H. R. 1203) to abolish such suits. The bill was amended in the Senate and was adopted on September 17, 1943 (H. R. 1203, as amended by Senate, see Congressional Record, 78th Congress, 1st Sess. (p. 7699). The effect of the amendments in the Senate is to deny informers the right to bring suits where they have no original information. The debates in the Senate reflect deep concern over the abuses which the recent multiplication of suits under the Informer's Act have involved (See Congressional Record, 78th Congress, 1st Sess., pp. 7652-7661, 7678-7699). At this writing, Conference Committees have been appointed by both Houses to compose the differences between the House and Senate versions of the bill. It clearly appears that members of

the House and of the Senate have recognized that proceedings on the part of the United States are properly to be conducted by the Department of Justice, that informer's zeal has grave vices. With this policy in mind, it cannot be regarded as without significance that, in this case, the authorized representative of the Anti-trust Division stated that no charge of fraud was involved in the transactions covered by the anti-trust indictment and that no proceedings by the Government charging fraud were ever taken. The Government was not hindered from making such charges by premature informer's action; this suit was brought a year and a half after the composition of differences between these respondents and the Anti-trust Division. Government counsel made no attempt to intervene or interest themselves in this suit until the petition for certiorari was filed and they apparently did so then only because of their concern with what the court below said in its opinion.

As we have already indicated, that opinion properly interposed was correct. But even if anything in the opinion is not accepted here, the respondents are nevertheless entitled to an affirmance for, on this record, summary judgment for them was right.

CONCLUSION

The decision below affirming summary judgment for respondents was correct and should be affirmed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for Respondents,
Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
ARMAND F. MACMANUS,
ROBERT A. SINCERBEAUX,
EDWARD R. LOOMIE,
Of Counsel.

APPENDIX A

INFORMER'S ACT

Revised Statutes, Sections 3490-3494, 5438

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respec-

tive districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

"Sec. 3494. Every such suit shall be commenced within six years from the commission of the act, and not afterward.

* * * * *

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who

enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

APPENDIX B

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

28 U.S.C.A. following §723c

Rule 12. *Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings*

• • •

(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

• • • • • • •

Rule 15. *Amended and Supplemental Pleadings*

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no

responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

• • • • • •

Rule 56. *Summary Judgment*

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits,

if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion

that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX C

Opinion of District Judge Bright in *United States ex rel. Gertrude Edelstein* v. *Brussell Sewing Machine Co. Inc. et al.* (Civil Action 20-492 S.D.N.Y., Sept. 15, 1943.)

The defendants Brussell Sewing Machine Co. Inc., and Alan Mehler (the only defendants served) move to dismiss the complaint as failing to state a claim, or for summary judgment. The action is brought under the False Claims Statute, also known as Informers Act (R. S. 3490-3493 Sec. 31 U.S.C.A. 231-234) to recover double damages and costs alleged to have been suffered by the United States by defendants' fraud in obtaining Government contracts for the manufacture of torpedo parts.

The complaint alleges that pursuant to a conspiracy to defraud the United States, between November 1941 and the beginning of the action, the defendants to induce the United States Naval Torpedo Station to award contracts to the Machine Company, submitted bids in which the Machine Company represented that it was a manufacturer, set forth the price at which it would manufacture the parts, and represented its costs of manufacture and its profit estimated at 6%; that the representations were false, fictitious and fraudulent in that (a) the Machine Company did not intend to manufacture the parts but to subcontract therefore, (b) the costs set forth in the bid were more than twice the fair and reasonable costs of manufacturing and the Company's true estimate thereof, and (c) the anticipated and actual profit was more than 100%. It is further alleged that the contracts were awarded in reliance upon the bids and representations; and from time to time the Machine Company submitted bills for payment, which were certified as just and correct,

but which were false and fraudulent by reason of the facts set forth in a, b and c, and such bills were paid by the United States in reliance upon said statements.

It is to be noted that the only claim of fraud is in the bidding. It is not alleged that the bids were collusive, that the contracts were not fully performed, or that the parts delivered were in any way defective or deficient or not in accordance with the contract in quality, quantity or otherwise.

The statute upon which this action is based provides, insofar as material, as follows:

> "Any person not in the military or naval forces of the United States * * * who shall make * * * or present * * * for payment * * * to or by any person or officer in the * * * naval service of the United States, a claim upon or against the Government * * * knowing such claims to be false, fictitious or fraudulent, or who, for the purpose of obtaining * * * payment * * * of such claims, makes * * * any false bill * * * certificate, affidavit or deposition * * * or who enters into any conspiracy to defraud the Government * * * by obtaining * * * payment * * * of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000., and, in addition, double the amount of damages which the United States may have sustained * * *".

The contracts obtained by the Machine Company, nine in number, have been submitted to me. Their inspection was denied the plaintiff because of a clause in them that they should be treated as confidential and the contractor is prohibited from divulging any information whatsoever

concerning the work under the contract to any unauthorized person.

All of them are practically identical in terms. They provide, in part, that the emergency will not permit delay incident to advertisement for competitive bids; that the contractor has an organization, plant, and facilities of sufficient capacity for doing the work; that the contractor will repair or replace any damage due to faulty material furnished by the contractor or his sub-contractor; that no alien in the employ of the sub-contractor shall have access to the plans or work or participate in the contract trials, without the written consent of the Secretary of the Navy under certain conditions; and that each subcontract shall include the National Defense Contract Clause, which, among other things, excludes any person designated by the Secretary as undesirable.

It is clear that subcontracting could not be the basis for any charge of fraud. This was conceded by the plaintiff upon the argument. It is now claimed that the representation that the Machine Company would manufacture, when it did not intend to do so, was one of the misrepresentations, but it is not shown that it did so state, and its contract is otherwise; and in any event it is shown by the moving papers that it did manufacture some or all of the parts and subcontracted other portions. Its contract was that it had the organization and facilities to do the work, and there is express provisions governing subcontracting.

The price agreement and certificate on preliminary negotiations, attached to the contracts, contain a clause showing a price analysis which is obviously an estimate, and is so stated to be, and which contains an "allowance

for profit" and a "total cost of production." Alongside of it is a column, not filled out in the copies furnished to me, entitled "Government Estimate" and in the third column is the "Accepted Price." It is stated below there that "The prices accepted and mutually agreed to are considered to be fair and reasonable." It is shown without contradiction that the parts contracted for had previously been made by the Navy and it would therefore, be cognizant of their cost of manufacture. Instances are proven where bids of the Machine Company had been rejected because, after comparison with manufacturing costs at the Naval Station, the prices were found to be higher than the Navy's price.

The profit was also estimated, and if the costs were known by the Navy from its own manufacturing, it also knew the costs. It is clear that the estimate could not be accurate as to costs and profit, in view of the emergency and the consequent upsetting of labor and material markets. Even if the estimated profit can be said to have been far below the actual or anticipated return, I can see no basis of fraud. And it is certain that any excessive profits may be recaptured by the Government upon renegotiation under the Revenue Act of 1942, Chap. 619, Sec. 801, Title 8 relating to renegotiation of war contracts, effective April 28, 1942.

It is shown that in a letter dated April 1, 1943, from the Navy Department to the Machine Company, the Chairman of the Price Adjustment Board wrote in part:

> "The Secretary of the Navy • • • has determined that your profits under said contracts and subcontracts can be determined with reasonable certainty for all fiscal periods up to and including

> December 31, 1942 * * * Based on the facts disclosed by such negotiations, it has been found * * * that under said contracts and subcontracts, you have realized no excessive profits * * *"

It is true, however, that after the making of this motion, and obviously after plaintiff's counsel had been informed of that ruling, and after written and oral communication by him, the Machine Company on May 22, 1943, was notified that renegotiation would be reopened.

I am not convinced, however, if an excessive profit were made upon the contracts, that would be a fraud under the circumstances shown here.

And, finally, I do not think the law under which this action is brought was even intended to include the situation here revealed. There was no collusive bidding, nor any conspiracy between the defendants and a government official, nor any failure of performance. So far as appears, the parties dealt at arm's length, neither dependent upon the other, nor influenced by their statements. The government officials were cognizant of how to manufacture the parts and the cost. The defendants were pioneering in new fields to devote their civilian plant and organization to the war effort. They submitted bids which the government could and did accept and reject. It was clearly not the intention of the statute to condemn transactions because the parts could have been obtained more cheaply under the circumstances. Nor, I believe, was it the intention of the statute to make dealings with the Government hazardous, should some one later conceive the notion that the Government had paid or contracted to pay too much. Certainly, under the circumstances shown here, there would be no fraud, as between merchants, manufacturers

or buyers. On the Government side were presumably expert and informed procurement officers. The Government has received what it contracted for. And the only claim shown was for the stipulated price. If such transactions are within the condemnation of the statute, however construed, no one dealing with the Government could rely on any official's decision, no contract price would be final; in fact no contract would be of any value. Price and contract, and the informed judgment of purchasing officers, would always be subject to be set aside by informers at any time, upon claims of fraud such as here presented, and perhaps with even less semblance of merit.

In the last analysis, the foundation of plaintiff's claim of fraud is excessive profit and the alleged concealment of sub-contracting. There is no basis for the latter, and the Government could not be damaged by the former in view of the Renegotiation Act.

The cases of *U. S. ex rel. Marcus* v. *Hess* (317 U. S. 537; 87 L. Ed. 374) and *U. S.* v. *New Orleans Chapter* (U. S. ; 87 L. Ed. 387) are not to the contrary. In each there was collusive bidding among the several contractors by which all possible competition was removed, which did not exist herein.

The motion for summary judgment is granted, without prejudice to any rights of the United States, with costs; settle order on notice.

FILE COPY

Office - Supreme Court, U.
FILED
OCT 8 1943
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,
Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CARL ZEISS, Inc.

RAYMOND M. WHITE,
Counsel for Respondent CARL ZEISS, INC.,
One Wall Street,
New York 5, N. Y.

INDEX

	PAGE
OPINIONS	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
ARGUMENT	8
1. No facts alleging actionable fraud by Carl Zeiss, Inc. are pleaded	8
2. An informer's action lies only against defendants who have submitted fraudulent claims for payment by the United States or benefited thereby	15
3. An action under the informer's statute cannot be maintained against a corporation	17
CONCLUSION	18

TABLE OF CASES

Triangle Conduit & Cable Co. v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533	7
United States v. *American Tobacco Co.*, 221 U. S. 106	14
United States v. *Cohen*, 270 U. S. 339	16
United States v. *Cooper Corporation*, 312 U. S. 600	18
United States v. *Kansas Pacific Ry. Co., et al.*, 26 Fed. Cases 680	17

PAGE

United States ex rel. Kessler v. *Mercur Corporation, et al.*, 13 F. Supp. 742; affd. 83 F. (2d) 178..... 16
United States ex rel. Marcus v. *Hess*, 317 U. S. 537... 8
United States v. *Newbury Mfg. Co.*, 123 F. (2d) 453.. 7

Welch v. *T. W. Warner Co.*, 47 F. (2d) 231; affd. 47 F. (2d) 232..... 8

STATUTES

Informer's Act
Revised Statutes, Sec. 3490.....2, 3, 17
Revised Statutes, Sec. 5438.....2, 3, 16

Sherman Anti-Trust Act of July 2, 1890
Ch. 647, Sec. 1..... 4

Wilson Tariff Act of August 27, 1894
Ch. 349, Sec. 73..... 4

Federal Rules of Civil Procedure
Rule 15(a) 6
Rule 56(e) 6

Penal Code
Sec. 35 16
Sec. 37 16

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CARL ZEISS, Inc.

Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals to be reviewed was entered November 23, 1942 (R. 270). Petitioners invoke the jurisdiction of this Court under Section 240(a)

of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted May 3, 1943.

Question Presented

Whether, upon the record in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under §§3490-3494 and 5438 of the Revised Statutes, where both courts below have found that the petitioners had presented no genuine issue as to any material fact and respondents were entitled to judgment as a matter of law.

Statutes Involved

This action was instituted under R. S. §3490, which incorporates by reference certain of the provisions of R. S. §5438 as they appeared in 1874, when the act establishing the Revised Statutes was approved. Both of these sections are contained in what is generally known and referred to as the Informer's Act, R. S. §§3490-3494, 5438 (31 U. S. C. A., §§231-235) and provide as follows:

Revised Statutes, §3490:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Revised Statutes, §5438:

> "Every person (1) who makes or causes to be made, or presents or causes to be presented, for pay-

ment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or (3) who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars."

Statement*

This is a civil action for damages and penalties alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the Informer's Act (R. S. §§3490-3494; 5438, unamended). It was instituted a year and a half after the final disposition, in July, 1940, of certain criminal and civil proceedings which had been brought by the Anti-Trust Division of the Department of Justice. The Government had claimed that Bausch & Lomb, Carl Zeiss of Jena, Germany (not sued herein), and the other defendants herein had participated in a conspiracy and combination restrain-

---

* In order to save the time of the Court, the statement in the brief of respondent Bausch & Lomb having been examined and found to be correct, is adopted herein without change, *except that there is added the paragraph at the top of page 5 hereof which shows the pleas of respondent Carl Zeiss, Inc. to the indictment and that it was not made a defendant in the equity action.*

ing foreign commerce in violation of Section 1 of the Sherman Anti-Trust Act* and in restraint of import trade in violation of Section 73 of the Wilson Tariff Act.**

Those charges were based on certain agreements entered into between Bausch & Lomb and Carl Zeiss of Jena in 1921 and 1925, and a superseding agreement made in 1926, under which Bausch & Lomb acquired the exclusive license and right to manufacture and sell military optical instruments in the United States under the inventions and patents of Carl Zeiss of Jena and assurance of its technical assistance and cooperation in scientific research for improvements and inventions in that field (R. 157-161). Carl Zeiss of Jena was to receive a royalty on all military optical instruments sold by Bausch & Lomb (R. 158). The Government did not charge either that Bausch & Lomb had a monopoly in the manufacture and sale of military optical instruments in the United States or to the United States Government, or that the purpose or intent of the agreements was to give it such a monopoly.

The anti-trust proceedings terminated in pleas of *nolo contendere*, the payment of fines and the entry of a consent decree (R. 243-248), which expressly provided that no testimony had been taken; that the defendants consented to the entry of the decree without any findings of fact "upon condition that neither such consent nor this decree shall be evidence, admission or adjudication that they have violated any statute of the United States * * *" (R. 243). Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, expressly stated in open court at the time of acceptance of the pleas, in response to a direct question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, the Government's bills of particu-

---

* Act of July 2, 1890, Ch. 647, §1, 26 Stat. 209, 15 U. S. C., §1.

** Act of August 27, 1894, Ch. 349, §73, 28 Stat. 570; February 12, 1913, Ch. 40, 37 Stat. 667, 15 U. S. C., §8.

lars and exhibits, the equity complaint, and the consent decree are in the record (R. 86-248) and were before the courts below.

Respondents originally on March 29, 1940 pleaded not guilty to the indictment (R. 42, 111). On May 27, 1940, the respondent Bausch & Lomb pleaded *nolo contendere* to avoid interruption of government work (R. 23-24, 30, 110). Thereafter on March 5, 1941 respondent Carl Zeiss, Inc. pleaded *nolo contendere* (R. 42, 110) since not to have done so would have burdened it with an expensive trial. Carl Zeiss, Inc. was fined only $1000. and was not made a defendant in the equity action.

Petitioners have not denied, and the record clearly shows, that their case is based solely on the court record in the anti-trust proceedings. Yet, when they served their complaint (R. 3-10), it contained general charges of fraud predicated upon a distorted version of the plain provisions of the written agreements which were matters of record in that proceeding.

This misconstruction, which petitioners now claim to have been merely inadvertent, permeated the entire complaint. It was charged that under the agreements Bausch & Lomb agreed to and did add 20% to its prices on sales by it of military optical instruments to the United States Government, and agreed to and did pay the amount of such mark-up to Carl Zeiss of Jena. (Compare R. 25-27 and 233-236 with R. 5-8 and 221-222.) Nor was this the only distortion of facts of record to be found in that pleading.*

Desiring to obtain immediate and definitive relief against the false charges of fraud which had been made, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for

---

* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss, Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb but also of Carl Zeiss, Inc.

summary judgment. In conformity with the explicit requirements of Rule 56(e) of the Federal Rules of Civil Procedure, respondents submitted affidavits in support of the motion (R. 17-33), based on personal knowledge, in which the affiants set forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States Government. The affidavits showed the critical importance of immediate disposition of the case to avoid interruption of work for the Government. The petitioners opposed with an affidavit which clearly failed in any way to meet the requirements of Rule 56(e), contained no facts based upon knowledge in support of the complaint, and merely served to bring the anti-trust proceedings file into the record.

Just before the return day of the motion, petitioners served what can best be described as a renovated complaint (R. 78-85), withdrawing the above noted false charges. This document merely plagiarized the Government's charges in the anti-trust proceedings and added general charges of fraud to bring the case under the Informer's Act.

Respondents took immediate steps to forestall this attempt by the petitioners to delay final decision. The purported amended complaint was rejected because it was an untimely amendment as of course under Rule 15(a) of the Federal Rules of Civil Procedure (R. 51, 54-56); inasmuch as the respondents, by moving for summary judgment, had already interposed a "responsive pleading" within the fair meaning of that Rule. Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the District Court on motion for summary judgment as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents in the alternative renewed the motion to dismiss and for summary judgment.

The District Court in one judgment dismissed the original complaint and granted summary judgment for all respondents (R. 259-262). In a separate order, it granted respondents' motions with respect to the attempted amendment, declared it to be a nullity, and denied leave to amend in accordance therewith (R. 254-8). Not having permitted amendment, it did not pass directly upon respondents' motions to dismiss the amended complaint, although its denial of amendment was based upon the view that it did not state a cause of action (R. 258). Petitioners appealed from the judgment and the order of the District Court. On November 5, 1942, the Circuit Court of Appeals unanimously affirmed, *Per Curiam*, the orders and judgment of the District Court, being of the opinion that whether amendment should have been permitted or not, or whether or not the proposed amended complaint, taking it as it read, stated a cause of action, summary judgment for defendants was required (R. 267-269).*

---

* While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the District Court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the District Court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C. C. A. 3, 1942). The reason for limiting the right to amend without leave of court after such a motion is obvious; plaintiff must then meet the motion on the merits and should not be permitted to delay consideration by *ex parte* amendment. If he can show good grounds for amendment, the application should be made to the court which can consider them. Compare *United States* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C. C. A. 1, 1941), which deals, however, with a motion to dismiss rather than a

(Footnote continued next page)

On January 18, 1943, this Court handed down its decision in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943). Thereupon, these petitioners, adopting a new theory of fraud, sought certiorari.

The Solicitor General filed a brief *amicus* in support of the petition apparently because Government counsel regarded the construction of the statute by the court below as using fraud in the accepted sense of deceit, as being too narrow. The brief was, naturally, concerned with what the court below said; it did not attempt to analyze this record and challenge what the Court, in fact, did in affirming summary judgment. Thus, the brief expressed apprehension as to possible disposition of cases quite unlike this one.

ARGUMENT*

1. No facts alleging actionable fraud by Carl Zeiss, Inc. are pleaded.

Respondent Carl Zeiss, Inc. was incorporated in New York December 11, 1925 (R. 88), and although its sole stockholder is Carl Zeiss, Jena, of Germany, it is a separate entity.

---

motion for summary judgment. Where only a motion to dismiss is made and defendant has not invoked a scrutiny of the underlying facts, reason exists for permitting correction of the pleading without application to the Court. In holding that amendment should be denied when the proposed amendment is insufficient, the District Court was on sound ground. See *Welch* v. *T. W. Warner Co.,* 47 F. (2d) 231 (S. D. N. Y., 1930), aff'd 47 F. (2d) 232 (C. C. A. 2, 1931). It is unnecessary for this Court to pass on these questions since, as we indicate *infra,* the critical question is whether or not summary judgment for respondents was correct.

* At the request of counsel for the respondent Carl Zeiss, Inc. he has been furnished with a copy of the brief of respondent Bausch & Lomb and in order to save burdening the Court, the argument therein is not repeated though adopted in so far as it applies to Carl Zeiss, Inc.

The agreements between Bausch & Lomb and Carl Zeiss, Jena, were entered into before the incorporation of Carl Zeiss, Inc.

The affidavit of M. H. Eisenhart shows (R. 26):

> "(a) None of these agreements was made between Bausch & Lomb Optical Company and the defendant Carl Zeiss, Inc. All were made with Carl Zeiss, of Jena, Germany. Indeed, the agreement of April 28, 1921 was made more than four years before the incorporation of the defendant Carl Zeiss, Inc. Carl Zeiss, Inc. had nothing to do with any of these agreements, nor has Bausch & Lomb had any dealings with Carl Zeiss, Inc. in connection with the subject matter of these agreements."

The royalty payments made by Bausch & Lomb were to Carl Zeiss, Jena, and not to respondent, Carl Zeiss, Inc. (R. 28).

The affidavit of Karl A. Bauer states (R. 42-43):—

> ". . . Carl Zeiss, Inc. was incorporated in 1925 and never at any time in the history of its existence did it deal or was it concerned with the sale of any such instruments as are listed or any other instrument of any sort that would answer the description of military optical instruments. Its business is altogether confined to the sale of cameras, telescopes, microscopes and optical instruments as used in civil businesses. It never at any time carried any such instruments. The only charge against the defendant Carl Zeiss, Inc. made by the Government in the Anti-Trust suit was that the defendant Carl Zeiss, Inc. had declined from importing, selling or dealing in such instruments because of certain agreements made between Carl Zeiss, Jena and Bausch & Lomb Optical Company."

Carl Zeiss, Inc. was never at any time engaged in the business of producing, importing, selling or handling military optical goods.

Without conceding that the anti-trust indictment is admissible evidence on the motion for summary judgment,

it is obvious therefrom that plaintiffs had no information as to Carl Zeiss, Inc., except that which could be gleaned from the indictment or bill of particulars. The allegations of the indictment indicate that there is no basis for a claim in this action against Carl Zeiss, Inc.

The indictment (R. 86-107) alleges that the defendant

> "... Carl Zeiss (hereinafter referred to as Zeiss) is a corporation ... of Germany ... for many years has been and is now engaged in the business of manufacturing, among other things, military optical instruments at its plant in Jena, Germany, and distributing and selling those instruments in Germany and in other countries in the world." (Par. 4) (R. 87).

It will be noted that Carl Zeiss, Jena, and not respondent Carl Zeiss, Inc. is referred to in the indictment and also in the amended complaint (R. 79) as Zeiss, and it will be noted further that the manufacturing was done outside the United States and there is no allegation of any manufacturing of military goods within the United States by Carl Zeiss, Jena or by respondent Carl Zeiss, Inc., the allegation as to activities in countries other than Germany being limited according to the statement of the indictment to

> "distributing and selling those instruments in Germany and in other countries of the world."

The indictment further alleges in Paragraph 16 (R. 93):

> "The defendants, Bausch & Lomb and Zeiss, from on or about April 28, 1921 to the date of the presentation of this indictment ... have been continuously engaged during and throughout the periods of time aforesaid in an unlawful combination and conspiracy to suppress and limit competition between themselves by agreeing (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world; ... (d) that Zeiss would not permit any person, firm or cor-

poration which was engaged, or which wished to engage in the United States in the business of manufacturing and distributing military optical instruments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss on any terms in connection with such manufacture and distribution even though such persons, firms or corporations were ready, willing and able to compensate Zeiss for the use of such knowledge, information, devices, instruments, machinery or equipment. . . ."

Paragraph 10 (R. 90) of the indictment alleges:

> "For many years prior to 1921, Bausch & Lomb and Zeiss competed with each other . . . in the sale of . . . military optical instruments. Since 1921, Bausch & Lomb and Zeiss have not competed either in the United States or any other countries in the world in the sale and distribution of military optical instruments."

Paragraph 14 (R. 92) of the indictment, second sentence, states:

> ". . . Zeiss has shipped the said military optical instruments from points in Europe to Bausch & Lomb. . . . Except for the said military optical instruments so shipped, neither Bausch & Lomb nor Zeiss has shipped to or imported into the United States any military optical instruments which have been manufactured outside the United States."

It would appear from the quotations from Paragraphs 10 and 14 of the indictment, therefore, that respondent Carl Zeiss, Inc. has not received any military optical instruments from Carl Zeiss, Jena, and has not been by its parent company permitted to import or handle military optical instruments.

Paragraph 17 (R. 98) states:

> "(f) At all times subsequent to May 1, 1921, to and including the three years next preceding the date

> of the return of this indictment . . . Zeiss has refused to permit any person, firm or corporation engaged in, or who wished to engage in the manufacture and distribution of military optical instruments in the United States in competition with Bausch & Lomb, to use any of the devices, knowledge, instruments and equipment of Zeiss for the production of military optical instruments even though such persons, firms and corporations were ready, willing and able to compensate Zeiss for any such use."

From the foregoing it appears that Carl Zeiss, Jena, the German corporation, manufactured military optical instruments exclusively at Jena, Germany; that it never sold (nor permitted the distribution of) such military optical instruments in the United States, but only throughout the rest of the world; that respondent Carl Zeiss, Inc. was merely a distributing and selling corporation neither manufacturing nor producing, and that it never received or sold military optical instruments within the United States, although it was the "instrumentality and agency of Carl Zeiss, Jena" for "distributing and selling" other instruments for Zeiss in the United States. The indictment and amended complaint show in effect that respondent Carl Zeiss, Inc. never manufactured, produced, imported, owned, handled or disposed of military instruments at any time subsequent to May 1, 1921.

The indictment alleges, Paragraph 17 (R. 99):

> "(h) At all times subsequent to on or about December 11, 1925, to and including the three years next preceding the date of the return of this indictment, Carl Zeiss, Inc. has refused to sell military optical instruments for use in the United States."

They could not do other than refuse to sell, since as the indictment (R. 94) states:

> ". . . Zeiss would not permit any person . . . to engage in the United States in the business of manufacturing and distributing military optical instru-

ments in competition with Bausch & Lomb, to use any of the devices, information, instruments, machinery or equipment of Zeiss . . . in connection with . . . manufacture and distribution. . . ."

It is contended that the refusal (R. 99) on the part of respondent Carl Zeiss, Inc. to sell military instruments which it never manufactured, produced, imported, owned, handled or dealt in is not actionable fraud.

If this respondent can be sued for refusal to sell merchandise which it never had, no corporation in the United States would be free from such suit. A shoe shop, a druggist, a restaurant or liquor store, might be subject to indictment and civil liability for refusal to sell such instruments. They would be liable if Carl Zeiss, Inc. is liable. The mere fact that Carl Zeiss, Inc. handled other articles produced by Carl Zeiss, Jena, does not make it liable for refusing to sell merchandise with which its parent company never supplied it and which it never possessed.

The petitioners evidently considered that they had tied Carl Zeiss, Inc. into the alleged conspiracy by alleging that Carl Zeiss, Inc. was the "instrumentality and agency and wholly owned subsidiary of Zeiss and is completely dominated, controlled and operated by Zeiss."

Although Carl Zeiss, Jena, completely owned and controlled by stock ownership Carl Zeiss, Inc., this would not have made that subsidiary liable unless the officers and directors of Carl Zeiss, Inc. performed affirmative acts supporting the alleged conspiracy claimed to have been entered into by officers of the parent company. The only act complained of on the part of Carl Zeiss, Inc. was refusal to sell what they never had. The parent corporation may have been guilty of many offenses but unless these were brought home to the officers of the subsidiary and these officers aided and abetted therein, the corporation and such officers would neither be liable as a principal nor as accessory.

It may be that guilt and liability to an informer can be imputed to the officers of a holding corporation, if the sub-

sidiary or its employee personnel commits overt acts, but the contrary is not true. Guilt and liability to an informer cannot be imputed to the subsidiary and its officers for the overt acts of the dominant corporation. There is no allegation in the indictment or amended complaint of any overt act on the part of respondent Carl Zeiss, Inc. among all the allegations of conduct on the part of the other defendants. The only allegation is refusal to sell, and refusal to sell is quite understandable and quite clearly free from fraudulent intent or civil liability in view of the allegations that Carl Zeiss, Jena, the principal, would not permit any person, firm or corporation to use its devices in the manufacture or distribution of military optical instruments in the United States, except Bausch & Lomb.

It is possible that a subsidiary corporation may be liable

> "to the extent that they became cooperators in the combination",

as was true in the case of *United States* v. *American Tobacco Co.*, 221 U. S. 106, but that was an equity case brought to prevent the continuance of alleged violations of the Anti-Trust Law.

In an injunction case the Government may very properly enjoin the continuance of violations and include subsidiary corporations, agents, employees and attorneys of the parent corporation. Very little guilt need be shown to justify the court in enjoining subsidiary corporations as defendants which potentially may be or become participants in a continuing practice, but a complaint of an informer must be otherwise tested and a subsidiary corporation is not subject to liability unless it shall have been a cooperator in the combination and have committed an offense or done some fraudulent act that is the basis of the action.

If the petitioners are right in their contention, every employee of every corporation indicted or sued under the monopoly statutes could be indicted and civilly held, although such employees were entirely ignorant of any knowledge of the corporate conspiracy alleged.

Let us suppose someone called at the place of business of Carl Zeiss, Inc. and said to a salesman that he wished to purchase certain military optical goods. Let us assume that his employer was not a manufacturer, producer, importer, owner, handler or dealer in such goods,—and such is the fact—and the salesman said that he could not sell them. Could such salesman thereupon be indicted or be sued for conspiracy in restraint of trade? It is patent that he could not be so held. If his employer had not furnished him such goods to sell and there was no stock of such merchandise available for the employee to sell, it would be a dastardly situation if such salesman could be held for refusing to sell what was unavailable for sale.

Carl Zeiss, Inc. was a selling agency for Carl Zeiss, Jena, and in effect a salesman. The refusal on the corporate salesman's part to sell what the corporate salesman did not possess is not a refusal that should furnish the basis of a conspiracy charge, any more than if the corporate salesman were a salaried clerk.

2. An informer's action lies only against defendants who have submitted fraudulent claims for payment by the United States or benefited thereby.

Carl Zeiss, Inc. never submitted any claim to the United States for payment and hence does not come within the purview of the Informer's Statute.

As stated in petitioners' brief, p. 15:

> "In essence, therefore, the statute imposes liability—so far as here important—upon those who do two things: (1) submit claim for 'payment' by the United States, (2) knowing that such claims are 'fraudulent'."

The amended complaint alleges (R. 83):

> "The defendants, other than Carl Zeiss, Inc. . . . have presented for payment and approval to various

> officers of the . . . United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States . . ."

To the same effect is paragraph Seventeenth of amended complaint:

> "such bids, claims . . . were presented by the defendants, other than Carl Zeiss, Inc."

So that it appears unequivocally in the record that one of the essentials imposing liability under the statute is missing, and hence Carl Zeiss, Inc. is not subject to the informer's action.

In *United States ex rel. Kessler* v. *Mercur Corporation, et al.*, 13 F. Supp. 742 (S. D. N. Y.—1935), affd. 83 F. (2d) 178; cert. den. 299 U. S. 576, Judge Patterson says as to the statute involved in this case:

> ". . . An informer's action will therefore lie only in cases where the defendant has made false, fictitious or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' "

This he took from *United States* v. *Cohen* (1926) 270 U. S. 339, pp. 345-346, where an indictment brought under Sec. 35 of the Penal Code was dismissed. In Ch. 351 of the Laws of 1909, Sec. 5438, of the Revised Statutes was repeated verbatim as Sec. 35 of the Penal Law so that the case is directly in point. The opinion points out clearly that Sec. 35 of the Penal Law relates only to the payment or approval of a claim against the Government based upon the Government's own liability for the claim. Further, at p. 346, it particularly holds that under Sec. 35 of the Penal Law the crime is restricted to defrauding the Government in dealing with the Government, and that Sec. 37 of the Penal Law (which has nothing to do whatever with the

Informer's Statutes) makes it a crime to conspire against the Government.

The United States cannot recover against this respondent under the Informer's Statute unless Carl Zeiss, Inc. presented for payment and approval to the officers of the United States bids, claims, invoices, bills, vouchers, statements and accounts against the United States, and petitioners herein have affirmatively stated that only defendants "other than Carl Zeiss, Inc." presented for payment and approval such bids, claims, etc.

3. An action under the informer's statute cannot be maintained against a corporation.

Carl Zeiss, Inc. is a dometsic corporation, incorporated under the laws of the State of New York (R. 78).

Section 3490 of the Revised Statutes states that an action may be brought against

> "any person not in the military or naval forces of the United States, etc."

The word "person" used in this section does not include a corporation, and the action could only be brought against an individual defendant.

See,

> *United States* v. *Kansas Pacific Ry. Co., et al.*, (1877) Fed. Case No. 15506 (26 Fed. Cases, p. 680).

The court, at p. 681, says:

> "If possible, in construing statutes, the legislative intent must be ascertained from the words of the act itself; and as the last act does not seem to indicate an intention to enlarge the scope of the act of 1863, but merely to arrange its provisions under different sections and titles, we may well look to the original act for light on this subject. Did section 3 contemplate

> bringing corporations within its provisions? It would seem not. It provides that every person, not in the military or naval forces, who shall commit the act, in addition to the penalty and forfeiture, may be imprisoned, etc. Section 5438, Revised Statutes, has the same provisions. These statutes evidently refer to such a class as are capable of being employed in the land or naval forces, or in the militia. It is further provided, in section 5 of the first act, that, in a suit to recover this forfeiture and damages, such person may be arrested and held to bail. The same provision is contained in section 3492 of the Revision. These various provisions of the law indicate to my mind that, in using the word person in the act of 1863, and in the Revised Statutes, it was the intention to restrict it to individuals, and not to make it applicable to corporations."

More recently in *United States* v. *Cooper Corporation*, 312 U. S. 600, it was likewise held that the United States was not a person under the construction of the statute involved therein.

CONCLUSION

The petition should be denied in so far as it concerns Carl Zeiss, Inc. and the decision below affirmed.

Respectfully submitted,

RAYMOND M. WHITE,
Counsel for Respondent CARL ZEISS, INC.,
One Wall Street,
New York 5, N. Y.

October, 1943

FILE COPY

FILED
OCT 13 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO GOVERNMENT'S BRIEF *AMICUS CURIAE*

WHITNEY NORTH SEYMOUR,
Counsel for Respondents,
Bausch & Lomb Optical Company, et al.

SIMPSON THACHER & BARTLETT,
Of Counsel.

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

against

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO GOVERNMENT'S BRIEF *AMICUS CURIAE*

We respectfully ask leave to comment on several matters in the Government's brief *amicus curiae,* received after our brief was printed. All other matters are adequately covered in our main brief.

I

(A.)

After an elaborate analysis of the proceedings in the District Court (Gov't. Br. pp. 3-16) Government counsel contend that the record upon which this case was decided below should not be considered by this Court in its en-

tirety. It is their contention that the Court should disregard respondents' affidavits (which compel affirmance) and consider only the proposed amended complaint. Despite this position they themselves are not averse to piecing out or bolstering the proposed amended complaint by using excerpts from the anti-trust proceedings—matter which on their own theory would be equally *dehors* the record.

It is clear that Government counsel are in error as to what the District Court passed upon. The moving affidavit of respondents' counsel (R. 49-53), annexed to the order to show cause dated January 14, 1942 (R. 46-48), expressly asked that the proposed amended complaint "* * * be considered * * * upon the motions brought on by the earlier order to show cause as an admission by the plaintiffs and for all purposes except as an amended complaint" (R. 50). The recitals in the order and judgment granting summary judgment to these respondents expressly state that the proposed amended complaint was before the District Court and was considered by it (R. 260). The Court below likewise weighed the entire record and concluded that the proposed amended complaint like the original was subject to summary judgment. As appears from its regular course of dealing with summary judgment cases, it is implicit in the decision of the Court below affirming summary judgment dismissing the complaint that on the basis of the evidence adduced, an amended complaint could not have been framed which would not itself be subject to successful attack by motion for summary judgment. *Seaboard Terminal Corporation* v. *Standard Oil Co.*, 104 F. (2d) 659 (C.C.A. 2, 1939); *Rossiter* v. *Vogel*, 134 F. (2d) 908, 912 (C.C.A. 2, 1943); Cf. *Downey* v. *Palmer*, 114 Fed. (2d) 116 (C.C.A. 2, 1940).

Accordingly, their argument as to the record is plainly erroneous, for this Court cannot properly exclude from consideration affidavits upon which the decision below was based. The consequences of such affidavits are adequately described in our main brief.

(B)

Government counsel also misapprehend the nature of the proceedings under Rule 56 (Gov't. Br. pp. 21-2) in their observations about the evidence required by that rule. It is suggested that while the anti-trust proceedings were not admissible evidence, still they were to be given some weight especially when compared with the affidavits of those who were alleged "conspirators". Such a contention ignores the fundamental principle that there is no weight of evidence problem in a summary judgment case; either a genuine triable issue has been created by the presentation of admissible evidence or it has not.

II

(A)

Our main brief points out why this case does not involve a competitive bidding problem. It is worthy of note that Government counsel point to no evidence or considerations which would support the conclusion that the Army and Navy considered Carl Zeiss of Jena as a source of military optical instruments, much less that they viewed it as a potential competitive bidder.

(B)

We likewise showed in our main brief that the 1921 and 1925 agreements were terminated by the 1926 agree-

ment. The Government makes no claim that the 1926 agreement violates the provisions of the Informer's Act. Its argument is entirely predicated upon allegations unsupported by evidence that the 1921 and 1925 agreements survived the 1926 agreement. No evidence in the record justifies any such inference. These respondents have affirmatively established that neither in 1925 nor at any other time were protective offers made in any transactions with the United States to which Bausch & Lomb was in any way a party, and petitioners have failed to adduce any evidence to the contrary.

Moreover, Government counsel, like petitioners, disregard the true nature of the agreements between the parties. None of these agreements resembles the type of agreements aimed at blocking or defeating competitive bidding requirements which are considered in the cases cited by them.

III

Government counsel argue upon the basis of decisions and statutes which do not include the restrictive language involved in this statute, that the word "fraud" is broader than "common law deceit" and, therefore, that the interpretation of the present statute by the court below was wrong. The word "fraud" is not to be found in the Informer's Act, and, of course, the court below was not called upon to construe the Act as if that word was used. Since the statute relates to "false, fictitious or fraudulent" claims the court below sought to determine what was meant by that language. It properly took the view that those three words when used in juxtaposition share in common the notion of deceit.

In seeking to expand the familiar meaning of the words used in this statute, Government counsel have placed considerable emphasis on Section 37 of the Criminal Code (18 U. S. C. Sec. 88) which proscribes conspiracies to defraud the United States "in any manner or for any purpose". This contention overlooks the fact that the agreement or conspiracy to defraud which is denounced in the third clause of R.S. §5438 (Resp. Br. pp. 49-50) is one to defraud by the use of "false or fraudulent claims". Thus, it would read out of the statute these words of limitation, an excision which would seem to render their separate existence unnecessary. It is implied that the interpretation by the court below was due to its distaste for *qui tam* actions (Gov't. Br. p. 27). This suggestion ignores the statement by the court below, that "This [interpretation] would be the necessary result were the statute of the usual kind and entitled to a broad interpretation * * *" (R. 268).

The Government argues alternatively that the elements of common law fraud and deceit were present because of alleged concealment of the agreements between Zeiss and Bausch & Lomb. Among other difficulties with this argument, it overlooks the basic requirement in fraud cases dealing with concealment, that concealment constitutes deceit only where there is a duty of disclosure. Cf. *United States* v. *Groves*, 122 F. (2d), 87, 90 (C.C.A. 2, 1941).

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for Respondents,
Bausch & Lomb Optical Company, et al.

INDEX

	Page
Preliminary statement	1
Statement of facts	2
Statement of the interest of the United States	4
Conclusion	9

CITATIONS

Cases:

Bradford v. *United States*, 129 F. 2d 274, certiorari denied Nov. 23, 1942	9
Crocker v. *United States*, 240 U. S. 74	6
Denn v. *Reid*, 10 Pet. 524	8
Glover v. *United States*, 316 U. S. 690	9
Helvering v. *N. Y. Trust Co.*, 292 U. S. 455	8
Leche v. *United States*, 118 F. 2d 246, certiorari denied, 314 U. S. 617	9
McDermott v. *United States*, certiorari denied, Feb. 15, 1943, No. 632 this Term	9
McMullen v. *Hoffman*, 174 U. S. 639	6
Ozawa v. *United States*, 260 U. S. 178	8
Pandolfo v. *United States*, 128 F. 2d 917, certiorari denied, Oct. 12, 1942	9
Shushan v. *United States*, 117 F. 2d 110, certiorari denied, 313 U. S. 574	9
United States v. *Cooper Corp.*, 312 U. S. 600	8
United States v. *Groves*, 122 F. 2d 87, certiorari denied, 314 U. S. 670	8, 9
United States v. *Katz*, 271 U. S. 354	8
United States ex rel. Marcus v. *Hess*, 317 U. S. 537	4, 5, 6
Warner v. *Goltra*, 293 U. S. 155	8

Statutes:

Alien Registration (8 U. S. C. 457 (a))	8
Article of War 94 (10 U. S. C. 1566)	8
Criminal Code:	
Section 35 (A) (18 U. S. C. 80, 83)	7
Section 37 (18 U. S. C. 88)	7
Section 215 (18 U. S. C. 338)	7
Internal Revenue (26 U. S. C. 293 (b))	8
Judicial Code, Section 172 (28 U. S. C. 279)	8
R. S. 3490–3493	1, 2, 5
R. S. 5438	2, 5
Securities Act (15 U. S. C. 77q)	8

Miscellaneous:
62 Cong. Globe: Page
P. 952 5
P. 955 5
P. 956 5
P. 957 5

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

PRELIMINARY STATEMENT

The petition for a writ of certiorari contains proper references to the opinion below (R. 267–269), the jurisdiction of this Court, the question presented, and the statute involved (R. S. 3490–3493, 5438). They will not be restated here.

We believe that the reasons for granting the writ stated in the petition present an adequate basis for review by this Court. In addition, however, we desire to point out in this memorandum that the decision below raises a question of public importance which will affect the right of the United States to recover damages and penalties under R. S. 3490–3493, and may affect the enforcement of other federal statutes. That question is: Whether a claim against the United States based on a contract procured as a result of an agreement between competitors that only one would submit a bid to the United States is fraudulent within the meaning of R. S. 5438 as incorporated in R. S. 3490–3493.

STATEMENT OF FACTS

This action was brought by petitioners in the name of the United States and in their own behalf pursuant to R. S. 3490–3493 to recover damages and penalties allegedly due the United States by reason of respondents' having submitted fraudulent claims to the United States. The allegations of the complaint and the agreements concerned,[1] so far as material here, may be briefly summarized as follows:

Bausch & Lomb Optical Company and Carl Zeiss of Jena, Germany, entered into an agreement to divide the world market for the sale of

[1] The original complaint appears R. 3–10, and the amended complaint appears R. 78–85. The agreements appear R. 145–161.

military optical instruments.[2] As part of the agreement Zeiss agreed that it would not sell to the United States and Bausch & Lomb agreed that it would not sell in the territory allocated to Zeiss.[3] Pursuant to the agreement Bausch & Lomb submitted bids to the United States, entered into contracts with the Government and received payment for the sale of military optical instruments.

Upon petition of respondents an order to show cause why the complaint should not be dismissed was issued by the District Court (R. 11–12, 46–48, 57–59) and supporting and counteraffidavits were filed (R. 13–38, 41–45, 49–56, 60–77, 249–253). On January 24, 1942, a final judgment was entered by the District Court dismissing the complaint (R. 254–262).

The opinion and judgment of the court below.— The court below, affirming the judgment of the District Court, held that although an agreement between two competitors that only one should submit a bid was a "wrong" on the United States, a claim based on a contract procured as the result

[2] Prior to the filing of the complaint in this cause respondents and Carl Zeiss of Jena, Germany, were indicted for violations of the Sherman Act and Section 73 of the Wilson Tariff Act (R. 86–109). The facts alleged in the complaint are similar to those set forth in the indictment.

[3] In this brief summary of the facts we have accepted the construction placed upon the agreement by the court below. As appears from the petition for certiorari, the contract between respondent and Zeiss included, in addition, an agreement by both parties to submit "protective offers."

of such an arrangement was not fraudulent within the meaning of R. S. 5438. The court reached this conclusion by construing the word "fraud" as used in the statute to be limited to the accepted common law sense of "deceit." There was no false representation here, the court said, since Bausch & Lomb in submitting its bid did not make any representation actual or implied that the bid was "normal," "reasonable," or "competitive," or that it had not collusively eliminated competition in the sale of military optical instruments to the United States. The court thought that this type of agreement was distinguishable from one such as that involved in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, where each conspirator submits a collusive bid; there each bidder, except the one selected by them to secure the contract, falsely represents by his act of bidding that he hopes his bid will be accepted.

STATEMENT OF THE INTEREST OF THE UNITED STATES

The Government did not appear or participate in the proceedings below. However, we are directly interested in the questions raised on this appeal (1) because we believe that the court erroneously concluded that the claim is not fraudulent within the meaning of R. S. 5438, and (2) because the specific issues here involved are closely interwoven with problems of importance

to the United States in the enforcement of other federal statues.[4]

1. The stringent interpretation placed upon the word "fraud" as used in R. S. 5438 frustrates the purpose of the statute and turns the word into one of crippling limitation. This statute is designed to protect the United States against those who seek to "cheat it," as this Court noted in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. Proponents, in urging passage of the bill, stated that its purpose was to eliminate "frauds and corruptions"[5] practiced on the United States and to prevent conspiracies formed for the purpose of "defrauding and plundering the Government."[6] The construction adopted below thwarts this broad purpose by making liability turn upon

[4] The United States also has a financial interest in the outcome of this litigation since it is entitled to recover one-half of any amounts collected in satisfaction of any judgment against respondents. In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, this Court rejected the Government's contention that private individuals may not institute a suit under R. S. 3490–3493 based on facts revealed in an indictment returned by a grand jury after a Government investigation. By filing this brief the United States is not modifying its position that suits brought by private individuals under such circumstances may lead to situations in which the enforcement of the law is not promoted but frustrated. However, since the decision of the court below raises issues of public importance, the United States is filing this memorandum to bring its views before the Court.

[5] 62 Cong. Globe, p. 952; see also pp. 955 and 957.

[6] *Ibid*, p. 955; see also p. 956.

legal technicalities requisite to the common law offense of deceit rather than upon a consideration of the purpose of the statute and the evils it was designed to prevent.

Such an interpretation in fact renders the statute a nullity in its application to collusive bidding. The desired objective of the conspirators could always be secured with impunity simply by selecting the right means of accomplishment. If more than one of the conspirators submitted bids, the Government could recover damages. However, the same result could be achieved without liability by arranging that only one of their number should submit a bid. Only the unadvised would ever run afoul the statute under such a restrictive interpretation.

It is our view that a claim based on a contract secured as a result of any conspiracy to eliminate competitive bidding, no matter by what means it is carried out, is fraudulent within the meaning of R. S. 5438. See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. See also *McMullen* v. *Hoffman,* 174 U. S. 639; and *Crocker* v. *United States,* 240 U. S. 74. That construction carries out the purpose of the statute and avoids artificial distinctions. No reason in public policy justifies such a distinction as that made by the court below, for any agreement between competitors to stifle competition violates public policy.

It is the unlawful objective to be achieved, not the particular means used, which the law condemns.

2. This case also raises questions broader than the specific issues involved. Although the decision of the court below relates only to the question whether the fraud prohibited by R. S. 5438 is confined to the accepted sense of deceit, the decision may have an effect upon the construction of other federal criminal statutes using similar terms.

Two important criminal statutes are derived from and contain language almost identical to that used in R. S. 5438. Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides for the punishment of any person who presents or causes to be presented to the United States any claim knowing it to be "false, fictitious, or fraudulent." Section 35 (A) (18 U. S. C. 83) also condemns any conspiracy to defraud the United States by obtaining or aiding to obtain the payment of any "false or fraudulent" claim.

Other important criminal statutes use the word "fraud." Section 37 of the Criminal Code (18 U. S. C. 88) prohibits any conspiracy to defraud the United States, and the mail frauds statute (Section 215 of the Criminal Code, 18 U. S. C. 338) speaks of any scheme to defraud or for obtaining money or property by means of false

or fraudulent pretenses. Additional examples are set forth in the margin.[7]

The decision below interpreting the word "fraud" in the common law sense of deceit, and without reference to the purpose and history of the statute, establishes a principle of construction that may lead to a narrow interpretation of other statutes using the same term. A statute in which the word "fraud" appears should be construed to achieve the purpose of Congress, determined in the light of contemporary circumstances[8] and the evils which the statute sought to eliminate,[9] and to avoid unreasonable consequences not contemplated by the legislature. That the word "fraud" has no single narrow meaning is shown

[7] Alien Registration (8 U. S. C. 457 (c)) ("Any alien . . . who procures . . . registration . . . through fraud" shall be subject to fine, imprisonment, and deportation); Article of War 94 (10 U. S. C. 1566) (any person in military service who presents or assists in presenting "false or fraudulent" claim against the United States or who attempts to "defraud" the United States shall be subject to court martial); Judicial Code, Section 172 (28 U. S. C. 279) ("Any person who corruptly practices . . . any fraud . . . in the proof . . . or allowance of any claim . . . against the United States shall, ipso facto, forfeit the same to the Government"); Internal Revenue (26 U. S. C. 293 (b)) (If any deficiency in income tax is "due to fraud" a penalty shall be collected); Securities Act (15 U. S. C. 77q) prohibits use of any scheme "to defraud" in sale of securities.

[8] *Helvering* v. *N. Y. Trust* Co., 292 U. S. 455, 464–465; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *Katz*, 271 U. S. 354, 357; *United States* v. *Cooper Corp.*, 312 U. S. 600, 605.

[9] *Warner* v. *Goltra*, 293 U. S. 155, 158; *Denn* v. *Reid*, 10 Pet. 524, 527.

the fact that it has been held that "fraud" demned by the mail frauds statute is broader n the common law sense of deceit and the an- t crime of false pretenses.[10]

n authoritative decision of this Court deter- ing the application of R. S. 5438 will be of in the recovery of damages suffered by the ted States as a result of the submission of usive bids and will also be of assistance in enforcement of other federal statutes in which word "fraud" is used.

CONCLUSION

'or the foregoing reasons the United States pectfully submits that the petition for a writ certiorari to the Circuit Court of Appeals for Second Circuit should be granted.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.

APRIL 1943.

United States v. *Groves*, 122 F. 2d 87, 90 (C. C. A. 2), iorari denied, 314 U. S. 670. See *Bradford* v. *United es*, 129 F. 2d 274 (C. C. A. 5), certiorari denied, Novem- 23, 1942, No. 455 this Term; *Pandolfo* v. *United States*, F. 2d 917 (C. C. A. 10), certiorari denied, October 12, 2, No. 223 this Term; *Leche* v. *United States*, 118 F. 2d (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan Inited States*, 117 F. 2d 110, 115 (C. C. A. 5), certiorari ied, 313 U. S. 574. See also the briefs for the United tes in opposition to petitions for writs of certiorari in *ver* v. *United States*, 316 U. S. 690, and *McDermott* v. *ted States*, certiorari denied, February 15, 1943, No. 632, Term.

U. S. GOVERNMENT PRINTING OFFICE: 1943

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement of facts	3
Summary of argument	16
Argument:	
I. The present posture of the case	17
II. Respondents' agreements not to bid against each other constituted fraud within the meaning of R. S. 5438, even apart from the protective offers disclosed in the antitrust pleadings	22
A. R. S. 5438 does not require that a common law case of deceit be made out	23
B. The elements of common law fraud were present	30
III. The agreements not to bid coupled with the provisions for protective offers constituted fraud upon the United States	33
A. The "protective offer" feature of the conspiracy establishes fraud under R. S. 5438	34
B. The "protective offer" feature of the conspiracy establishes fraud even under the lower court's construction of R. S. 5438	37
Conclusion	38

CITATIONS

Cases:	
Agnew's Will, In re, 132 Misc. 466, 230 N. Y. S. 519	33
Ames v. *Moir*, 138 U. S. 306	25
Atcheson v. *Mallon*, 43 N. Y. 147	30
Baldwin v. *Childs*, 249 N. Y. 212	33
Bradford v. *United States*, 129 F. (2d) 274, certiorari denied, 317 U. S. 683	25
City of Oakland v. *California Construction Co.*, 15 Cal. (2d) 573	26
Claflin v. *Commonwealth Insurance Co.*, 110 U. S. 81	36
Constructors Ass'n. of Western Pennsylvania v. *Seeds*, 142 Pa. Super. 59, 15 A. (2d) 467	26
Curley v. *United States*, 130 Fed. 1, certiorari denied, 195 U. S. 628	25

554682—43——1

Cases—Continued. Page

Donaldson v. *Farwell*, 93 U. S. 631 33
Eastern Trust & Banking Co. v. *Cunningham*, 103 Me. 455 .. 32
Equitable Co. v. *Halsey, Stuart & Co.*, 312 U. S. 410 31
Federal Land Bank of New Orleans v. *Green*, 11 La. App. 257, 123 So. 463 26
Finley Method Co. v. *Standard Asphalt Co.*, 104 Fla. 127 .. 26
Fleming's Heirs v. *Hutchinson*, 36 Ia. 519 26
Fulgham v. *Burnett*, 151 Miss. 111 26
Gillespie v. *J. C. Piles & Co.*, 178 Fed. 886 33
Glover v. *United States*, 316 U. S. 690 25
Graffam v. *Burgess*, 117 U. S. 180 25
Gulick v. *Ward*, 10 N. J. L. (5 Halst) 87 ..... 26, 32
Haas v. *Henkel*, 216 U. S. 462 25
Hammerschmidt v. *United States*, 265 U. S. 182 25
Hunter v. *Pfeiffer*, 108 Ind. 197 26
King v. *International Lumber Co.*, 156 Minn. 494 32
Leche v. *United States*, 118 F. (2d) 246, certiorari denied, 314 U. S. 617 25
Lincoln v. *Claflin*, 7 Wall. 132 36
Lloyd v. *Malone*, 23 Ill. 43, 74 Am. Dec. 179 ..... 26, 28
Lohr v. *George*, 65 W. Va., 241 27
McDermott v. *United States*, 131 F. (2d) 313, certiorari denied, 318 U. S. 765 25
McMullen v. *Hoffman*, 174 U. S. 639 ..... 24, 34, 37
Meiselman, in re, 105 F. (2d) 995 33
Ming v. *Woolfolk*, 116 U. S. 599 24
Moore v. *Crawford*, 130 U. S. 122 24
Morris v. *Woodward*, 25 N. J. Eq. 32 26
Mudsill Min. Co. v. *Watrous*, 61 Fed. 163 32
Nash v. *Delinquent Lands*, 111 Ark. 158 26
Nash v. *Elizabeth City Hospital Co.*, 180 N. C. 59 27
Noyes v. *Day*, 14 Vt. 384 28
Pandolfo v. *United States*, 128 F. (2d) 917, certiorari denied, 317 U. S. 651 25
Parker v. *New England Oil Corporation*, 13 F. (2d) 158 26
Pence v. *United States*, 316 U. S. 332 24
Perkins v. *Lukens Steel Co.*, 310 U. S. 113 31
Ray & Whitney v. *Maskin*, 100 Ill. 246 26
Ropner & Co. v. *Emmons Coal Mining Corp.*, 17 F. (2d) 386 (E. D. Pa.) 24
Seiling v. *Clark*, 18 Misc. 464 32
Shushan v. *United States*, 117 F. (2d) 110, certiorari denied, 313 U. S. 574 25
Singer Mfg. Co. v. *Yarger*, 12 Fed. 487 26
Slater v. *Maxwell*, 6 Wall. 268 26
Smith v. *Greenlee*, 13 N. C. (2 Dev.) 126, 18 Am. Dec. 564 .. 28
Spencer v. *Champion*, 13 Conn. 10 28
Stewart v. *Wyoming Ranche Co.*, 128 U. S. 383 31

Cases—Continued. Page

Strong v. *Repide*, 213 U. S. 419 ... 31
Swan v. *Chorpenning*, 20 Cal. 182 ... 26, 28
Thompson v. *Davies*, 13 Johns. (N. Y.) 112 ... 31
Toole v. *Johnson*, 61 S. C. 34 ... 27
Troup v. *Wood*, 4 Johns. Chan. 228 ... 28
Tyler v. *Savage*, 143 U. S. 79 ... 31
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, affirmed, 175 U. S. 211 ... 26, 32
United States v. *Groves*, 122 F. (2d) 87, certiorari denied, 314 U. S. 670 ... 25
United States v. *Plyler*, 222 U. S. 15 ... 25
United States v. *Purcell Envelope Co.*, 249 U. S. 313 ... 31
United States v. *Trinidad Coal Company*, 137 U. S. 160 ... 24
United States ex rel Marcus v. *Hess*, 317 U. S. 537 ... 16, 17, 23, 27, 29, 34, 36, 37
Whalen v. *Harrison*, 26 Mont. 317 ... 26
Whitaker v. *Bond*, 63 N. C. 290 ... 27
Woodruff v. *Berry*, 40 Ark. 251 ... 26, 32

Statutes:

Act of March 2, 1863, 12 Stat. 698 ... 28
R. S. 3490–3493, 12 Stat. 696 (31 U. S. C. 231–234) ... 3, 4, 11, 28
R. S. 5438, 12 Stat. 696 ... 15, 16, 22, 23, 27, 28, 37, 38
Criminal Code, Sec. 37 (18 U. S. C. 88) ... 25

Miscellaneous:

Black, *Tax Titles* (2d ed. 1893), Sec. 246 ... 27
Cong. Globe, 37th Cong., 1st Sess., p. 405 ... 37
Cong. Globe, 37th Cong., 2d Sess., Appendix, pp. 134–136 ... 29
Cong. Globe, 37th Cong., 2d Sess., pp. 116, 711–712, 1054 ... 37
Cong. Globe, 37th Cong., 3d Sess., pp. 198, 952 ... 28, 29
3 Cooley, *Taxation* (4th ed. 1924), Sec. 1425 ... 27
2 Freeman, *Executions* (3d ed. 1900), Sec. 297 ... 27
H. Rep. No. 2, *Investigation of Government Contracts*, 37th Cong., 2d Sess., pp. 36–37, 68, 83, 128 ... 29
2 Kent, *Commentaries* (7th ed. 1851), p. 701 ... 28
Kleber, *Void Judicial and Execution Sales*, Sec. 360 ... 27
3 McQuillin, *Municipal Corporations* (Rev. ed.) Secs. 1326, 1348 ... 27
3 Pomeroy, *Equity Jurisprudence* (5th ed.), Sec. 934 (d) ... 27
Prosser, *Handbook of the Law of Torts*, p. 721 ... 32
2 Restatement, Contracts, Sec. 517 ... 27, 30
Rule 15 (a) of the Federal Rules of Civil Procedure ... 18, 19
Rule 56 of the Federal Rules of Civil Procedure ... 21
Story, *Equity Jurisprudence* (1st ed. 1849), Sec. 293 ... 28
Story, *Equity Jurisprudence* (14th ed. 1918), Sec. 411 ... 27
5 Williston, *Contracts* (Rev. ed. 1936), Sec. 1663 ... 27
39 Op. Atty. Gen. 71, 93 ... 31
(1929) 29 Col. L. R. 95 ... 33
(1929) 42 Harv. L. R. 283 ... 33

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed because the case presents a question of public importance the decision of which will affect the right of the United States to recover damages and penalties under R. S. 3490–3493.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 267–269) is reported in 131 F. (2d) 545.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 23, 1942 (R. 270). The petition for a writ of certiorari was filed February 23, 1943, and granted May 3, 1943. The jurisdiction of the Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a claim against the United States, based on a contract procured by one who had entered into an agreement with a competitor that only one would submit a bid to the United States, is fraudulent within the meaning of R. S. 5438, as incorporated in R. S. 3490–3493.

2. Whether a claim against the United States, based on the performance of a contract procured by one who had entered into an agreement with a competitor that only one should submit a bid to the United States unless quotations were directly sought from the other, and that the other would then submit an artificial bid in the form of a protective offer, is fraudulent within the meaning of the statutes.

STATUTES INVOLVED

The provisions of R. S. 5438 (12 Stat. 696) and R. S. 3490–3493 (12 Stat. 696; 31 U. S. C. 231–234) are set forth in the appendices to petitioners' and respondents' briefs.

STATEMENT OF FACTS

This action was brought in the District Court of the United States for the Southern District of New York, by petitioners Brensilber and Thebner, on behalf of the United States and in their own behalf, pursuant to R. S. 3490–3493, to recover damages and penalties allegedly due the United States by reason of respondents having submitted fraudulent claims to the United States (R. 3–10). On respondents' motions and on the basis of supporting and counter affidavits (R. 11–77, 249–253), the district court entered an order dismissing the complaint and granting summary judgment (R. 259–262). It also denied petitioners leave to file a proposed amended complaint (R. 78-85) on the ground that it did not state a cause of action (R. 254–258). The court below affirmed (R. 267–270).

Original Complaint.—The original complaint named as defendants Bausch & Lomb Optical Company, Carl Zeiss, Inc., M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher, and made the following allegations:

Both concerns were engaged in the manufacture of military optical instruments purchased by the United States (R. 3–4). During the period 1921–1940, the defendants (respondents herein) and other unknown persons were continuously engaged in an unlawful conspiracy to fix unreasonable and artifical prices on sales of military optical equipment to the United States Govern-

ment. The conspiracy was promoted by a written agreement entered into between the two concerns on April 28, 1921, and by supplements thereto of June 27 and October 28, 1925, and November 26 and December 24, 1926. In this conspiracy, each concern agreed not to fix prices without the consent of the other, and when quotations were made to include a mark-up of up to 20 percent over the regular price, such mark-up to be paid by the successful bidder to the other party to the agreement. (R. 5–6.) Pursuant to the conspiracy the two concerns at various times between 1921 and 1940 submitted bids to the United States for military optical equipment at prices pretended and represented to be normal and competitive, and believed to be so by the United States and its representatives, but which were actually about 20 percent higher than normal and competitive prices; and in ignorance of the conspiracy, the United States from time to time contracted for the purchase of military optical equipment on the basis of such bids, paying the prices quoted by respondents. (R. 6–8.) Under the contracts thus obtained, respondents submitted claims to the United States and received payment thereon, which were fraudulent by reason of the conspiracy and their inclusion of an arbitrary mark-up of 20 percent. Respondents thereby violated R. S. 3490–3494 (R. 8–9), causing damages to the United States in the sum of $20,000,000 (R. 9–10). The complaint prayed for

recovery of twice that amount, plus $2,000 for each transaction (R. 10).

Order to Show Cause of January 6, 1942, and Supporting Affidavits.—On January 6, 1942, the individual respondents and respondent Bausch & Lomb obtained an order directing petitioners to show cause on January 16, 1942, why the complaint should not be dismissed (a) for improper venue, (b) for failure to state a cause of action, and (c) why summary judgment should not be granted for respondents on the ground that the complaint and respondents' affidavits annexed to the order showed that there was no genuine issue of fact and that respondents were entitled to judgment as a matter of law (R. 12).[1]

The annexed affidavits challenged the truth of various allegations in the complaint regarding the conspiracy,[2] and recited that on March 26, 1940, an indictment "covering the same subject as is now covered by the complaint in this action" was returned against the same defendants, charging

[1] On the same day respondent Carl Zeiss, Inc., moved to dismiss the complaint as to it and for summary judgment (R. 39).

[2] In addition to generally denying "in fact" the commission of any fraud upon the United States, the affidavits stated that the antitrust pleadings showed that petitioners erred in alleging that the individual respondents were officers of Carl Zeiss, Inc. (R. 25), that the agreements in question were entered into with Carl Zeiss, Inc. (as distinct from Carl Zeiss of Jena, Germany) (R. 26), and that under the agreements Bausch & Lomb was required to add 20% to all bids which it made to the United States on military optical instruments (R. 26–27).

554682—43——2

alleged violations of the Sherman Antitrust Act, to which they pleaded *nolo contendere*. The indictment was incorporated by reference in the affidavits without conceding "the correctness of all of the charges made" therein. (R. 23.) The affidavits further incorporated by reference an equity complaint, brought by the United States against respondents on July 9, 1940, "covering the same matters charged in the indictment," the consent decree entered in the equity suit (R. 24), and also certain agreements annexed to the complaint in that suit, bearing the dates of the agreements referred to in the petitioners' complaint in the case at bar (R. 5, 26).

Antitrust Indictment and Complaint.—Both the antitrust indictment (R. 86–109) and the equity complaint (R. 212–227), each of which charged an unlawful conspiracy, in violation of the antitrust laws, to suppress competition and divide the world markets in the sale of military optical instruments during the years 1921–1940 (R. 93-94, 219–220), centered largely around the aforementioned agreements annexed to the equity complaint, entered into between respondent Bausch & Lomb and Carl Zeiss of Jena, Germany.[3] (These agreements appear in full at R. 228–242.)

[3] Both parties were described as manufacturers of military optical instruments (R. 87–88, 216–217). The indictment and complaint both recited that any alleged acts done by Zeiss meant acts done by Zeiss of Jena in its own name, or through the agency of Carl Zeiss, Inc., or Nedinsco (R. 90, 216), wholly owned subsidiaries of Zeiss of Jena and wholly dominated and controlled by it (R. 88–89, 214–215).

The first agreement was entered into April 28, 1921. By paragraph 3 thereof, Bausch & Lomb "obligate themselves not to sell, directly or indirectly, military instruments *to countries* outside of the United States of America, and vice versa. Carl Zeiss obligate themselves not to sell such instruments, directly or indirectly, *to the United States* unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution" (R. 95, 221). [Italics supplied.] By paragraph 2 of the agreement, Bausch & Lomb agreed, allegedly in consideration of Zeiss' obligations under paragraph 3, that on every piece of military optical equipment which it sold to the Government of the United States during the succeeding 25 years, it would pay Zeiss a royalty comprising a percentage of the gross sales prices, whether or not the equipment was covered in whole or in part by Zeiss patents (R. 95–96, 221–222). And by paragraph 9, the parties agreed to conceal the existence of the contract from third parties and so far as practicable from their own employees (R. 95, 221).

The indictment and complaint next charged that the 1921 agreement was supplemented by agreements of June 27 and October 28, 1925, providing that if either party was requested to bid by governments in the other's territory, the former would make a quotation only upon consent of, and at a price agreed to by, the other party (called

a protective offer (R. 233–234)), containing a mark-up of 20% over the regular price, which was intended to throw the business to the party to whom the territory was allotted, and was to be paid to the other party if the bid were accepted (R. 96, 222).

The last agreement charged in the antitrust indictment and complaint was a "new agreement" signed by Bausch & Lomb on November 26, 1926, and by Zeiss of Jena on December 24, 1926, which purported to conclude "all previous agreements" (R. 241, 242). The 1926 agreement was identical with the 1921 agreement except that it omitted paragraph 9 calling for secrecy, modified paragraph 2 regarding royalty payments, and changed paragraph 3 so as not to indicate on its face the allocation agreement (R. 96–97, 223). Both the indictment and the equity complaint alleged that the change was induced by realization that paragraph 3 of the 1921 agreement, as supplemented in 1925, violated the antitrust laws of the United States, but that notwithstanding the revision, Bausch & Lomb "intended and continued to carry out the terms of paragraphs 3 and 9" of the 1921 agreement as supplemented in 1925 (R. 97, 223).[4]

[4] Paragraph 6 of the 1926 agreement provided: "In the production and sale of nonmilitary articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line. Special

The indictment and complaint charged further that from 1921 to within 3 years of the indictment and complaint Zeiss refused to sell military optical equipment to the United States without the consent of Bausch & Lomb, and that since June 27, 1925, Zeiss on various occasions offered to sell military optical equipment for use in the United States with the consent of Bausch & Lomb, at arbitrary, noncompetitive prices agreed to by both parties (R. 97–98, 224). It was charged that as a result of the conspiracy the defendants, among other things, "have exacted arbitrary, artificial, unreasonable and noncompetitive prices from purchasers of military optical instruments, including the Government of the United States" (R. 99, 225–226).

Amended Complaint.—On January 13, 1942, before the return of the order to show cause, petitioners served an amended complaint upon respondents (R. 78–85, 260). This alleged an unlawful conspiracy among Bausch & Lomb, Carl Zeiss, Inc., of New York (described as a wholly owned subsidiary of Carl Zeiss of Jena, Germany), and Carl Zeiss, Jena, Germany,[5] a manufacturer of military optical instruments purchased by the United States Government (R. 79–80), "to

agreements may be made regarding territories on nonmilitary articles. New projects may be placed at each other's disposal under royalty agreements." (R. 240.)

[5] The amended complaint also corrected the statements referred to in n. 2, *supra*, p. 5.

suppress and limit competition between themselves by agreeing" (R. 80–81)—

> (a) to divide the world market for military optical instruments into certain geographical areas, the exclusive territory of Bausch & Lomb to be the United States of America, and the exclusive territory of Zeiss to be the rest of the world;
>
> (b) not to sell directly or indirectly such instruments for use in the area or territory allotted to the other without the prior consent of the other;
>
> (c) in the case of sales made by consent for use in the territory of the other, to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of such military optical instruments; and that in consideration of the obligations assumed by Zeiss, as aforesaid, Bausch & Lomb agreed, among other things, to pay to Zeiss for a period of twenty-five years from May 1, 1921, a sum of money equal to a percentage of the gross sales price of each military optical instrument sold by Bausch & Lomb to the Government of the United States, the said sum of money to be paid irrespective of whether the piece of military optical equipment so sold was covered in whole or in part by patents owned by Zeiss.

The amended complaint went on to allege that, pursuant to the conspiracy, Bausch & Lomb submitted various bids to the United States Government for military optical equipment during the

period 1921–1940, at prices represented to be normal and competitive prices, but in fact in excess of such prices, and that such bids were accepted by the United States, which contracted for the equipment, in ignorance of the conspiracy and in the belief that the prices were normal and competitive (R. 82). It was further charged that Bausch & Lomb and Zeiss of Jena "by their concerted action" sold and delivered military optical equipment to the United States during 1921–1940, dividing the payments in accordance with their agreements (R. 81–82), and that under the contracts respondent Bausch & Lomb and the individual respondents at various times submitted and obtained payment of claims for payment against the United States, which were fraudulent in that, pursuant to the conspiracy, they included an arbitrary amount added to the normal and competitive prices (R. 83).

Respondent Carl Zeiss, Inc., was charged with participating and aiding the conspiracy, particularly in refusing to sell military optical instruments for sale in the United States (R. 81, 83). Like the original complaint, the amended complaint charged violations of the false claims statute (R. S. 3490–3491), and sought the recovery of double damages in the amount of $40,000,000, plus the statutory penalty of $2,000 for each offense (R. 84–85).

Order to Show Cause of January 14, 1942.—On January 14, 1942, the individual respondents

and respondent Bausch & Lomb obtained orders requiring petitioners to show cause on January 16, 1942, why an order should not be entered (R. 46–47)—

> (2) (a) Determining that the purported amended complaint of the plaintiffs herein * * * is a nullity.
>
> (b) Denying leave to the plaintiffs herein to amend their complaint in accordance with said purported amended complaint.
>
> Or in the event that said motion designated (2) (a) and (b) be denied, and the complaint is amended in accordance with said purported amended complaint,
>
> (3) * * * (b) Dismissing this action and the amended complaint herein as against the said defendants on the ground that the amended complaint fails to state a claim against these defendants upon which relief can be granted.
>
> (c) Granting summary judgment to these defendants upon the ground that the complaint and amended complaint, the affidavits annexed to the order to show cause dated January 6, 1942, and the affidavit hereto annexed show that there is no genuine issue as to any material fact herein and that these defendants are entitled to judgment as against the plaintiffs as a matter of law * * *.[6]

[6] On the same day respondent Carl Zeiss, Inc., obtained a similar order to show cause (R. 57–59) on affidavit of its attorneys (R. 60–63).

The annexed affidavit by counsel for the respondents urged the impropriety of the "purported amended complaint" on various procedural grounds and on the ground that "it so plainly fails to state a cause of action * * * that * * * it must necessarily be denied" (R. 49–51). The affidavit then recited (R. 52):

> Even if the complaint were to be deemed amended (which for the reasons stated would be improper), it is clear that it would have to be dismissed and summary judgment granted to defendants upon the grounds set forth in the order to show cause annexed hereto. Accordingly, that relief is sought in the alternative, *but only in the event that grounds 2 (a) and (b) of this motion are denied.* [Italics supplied.]

On January 15, 1942, petitioners filed two affidavits in "answer to the motion of [respondents] by order to show cause dated January 14, 1942" (R. 64–77). Like respondents' affidavits, these incorporated by reference the antitrust indictment and equity complaint against respondents and the consent decree in the equity suit and, in addition, the two bills of particulars filed by the Attorney General of the United States in connection with the antitrust indictment (R. 64–65). Petitioners' affidavits generally declared that these documents amply supported the ultimate facts and conclusions set forth in the original and amended complaints (R. 64–65) and that the affidavit of the

president of respondent Bausch & Lomb in support of the show-cause order of January 6, 1942, raised issues of fact, giving a version of the matters in question contrary to the allegations of the indictment (R. 68).[7]

Orders of the District Court.—On January 24, 1942, the district court entered an order and judgment dismissing the original complaint and granting summary judgment thereon to respondents (R. 259–262). On the same day, the district court also entered an order declaring "that the proposed amended complaint of the plaintiffs herein is a nullity" and denying petitioners "leave to amend their complaint in accordance with said proposed amended complaint on the ground that the said proposed amended complaint does not state a cause of action" (R. 254–258).

---

[7] The bill of particulars addressed to Bausch & Lomb included a letter (Exhibit "U"), dated March 7, 1928, from Bausch & Lomb to Zeiss, referring to an inquiry received by Nedinsco, Zeiss' Dutch subsidiary, from the United States for submarine periscopes, and indicating that Bausch & Lomb consented to a quotation by Zeiss at a price including 10% for Bausch & Lomb (R. 188–192).

Exhibit "V" of the same bill of particulars was a letter of February 25, 1938, from Bausch & Lomb to Zeiss, reading as follows (R. 193):

"In response to your letter in reference, you are free to quote on the Periscopes referred to direct to the Electric Boat Company, inasmuch as we may presume that these Periscopes are not intended for the use of our Government, considering that we have not received such an inquiry from our Navy Department."

The Decision Below.—Petitioners appealed from both the order granting summary judgment and the order declaring the amended complaint a nullity and denying leave to amend. In a *per curiam* opinion (R. 267–269), the court below affirmed the judgment of the district court (R. 263–264, 270). The court below stated that insofar as R. S. 5438 "perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy" (R. 269). The court held that under R. S. 5438 a showing of "fraud * * * in its accepted sense of deceit" (R. 267) was required, and that although it might be assumed that the contract between Bausch & Lomb and Zeiss gave Bausch & Lomb an advantage, this was not a fraud, inasmuch as a bidder for a contract "does not represent that there is an open market, or that his bid is 'normal' or 'reasonable,' or 'competitive' " (R. 268).

The court further held that it was immaterial whether, "taking the pleading as it reads", the district court was in error in ruling that petitioners' amended complaint failed to state a cause of action. The opinion states (R. 269):

> * * * in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset. The motion for summary judgment dismissing both was right because it appears

beyond question that the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere, and that this in turn rested upon the contracts. No testimony was necessary or indeed relevant to the issues so arising. * * *

SUMMARY OF ARGUMENT

A. The presentation of the claims to the United States pursuant to contracts procured as a result of a conspiracy that one party would not submit bids is a fraud on the United States within the meaning of R. S. 5438. Such a scheme cannot be distinguished from the collusive bidding arrangement considered in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. Furthermore, there is no basis for the decision below that fraud as used in R. S. 5438, is as narrow as common-law deceit. Judicial decisions show that "fraud" is used in a variety of senses, many of which are broader than deceit, and many such cases deal with agreements to stifle competitive bidding on public and private projects. In addition, the history of the statute here involved demonstrates that "fraud" was to be broadly construed as including any method of cheating the United States.

B. Even if we assume that "fraud", as used in R. S. 5438, means common-law deceit, we believe that an agreement not to bid violates the statute. One who bids in response to an invitation of the

Government manifests an intention to participate in a system of allocating contracts by competitive bidding. If he has previously, by secret agreement, suppressed competition, his bid creates a false impression upon which he intends the Government to rely, and the concealment of the collusive arrangement obviously induces the Government to enter into the contract at the agreed price. The tort of deceit can be predicated upon such concealment of a material fact.

C. In any event, the plan by which Zeiss was to make "protective offers" not intended to be accepted by the United States but for the purpose of concealing the conspiracy brings the case squarely within the case of *Marcus* v. *Hess*.

ARGUMENT

I

THE PRESENT POSTURE OF THE CASE

In view of the opposing contentions of the petitioners and respondents as to the record upon which this Court's decision must be predicated, we believe that it may be helpful to determine the present posture of the case.

Petitioners served their original complaint on December 26, 1941 (R. 49). On January 6, 1942, respondents filed their order to show cause, and motion (R. 11, 39) accompanied by affidavits, in which they moved both that the complaint be dismissed for failure to state a cause of action and

that summary judgment be granted. On January 13, 1942, petitioners served upon respondents an amended complaint (R. 78); if this was served before the filing of a responsive pleading to the original complaint, petitioners were entitled to amend as a matter of right. F. R. C. P. 15 (a).

On January 14, respondents moved, by way of order to show cause, (1) for an order declaring the amended complaint to be a nullity and denying petitioners leave to amend their complaint; and (2) if such relief was denied and the complaint amended, for an order dismissing the amended complaint for failure to state a cause of action and granting summary judgment on affidavits (R. 46–48, 57–59). An answering affidavit to this motion was filed (R. 64). The affidavits of both sides incorporated by reference as exhibits the pleadings in criminal and civil antitrust suits previously brought by the United States against respondents (R. 86–248).

On January 24, 1942, the district court entered two orders. One granted the first portion of respondents' motion of January 14; it declared the amended complaint to be a nullity and denied petitioners leave to amend "on the ground that the said proposed complaint does not state a cause of action" (R. 258). A separate order in response to the motions of January 6 (R. 259) (before the filing of the amended complaint), was entered granting the motion to dismiss and for

summary judgment with respect to the original complaint (R. 261). Appeals have been taken from both orders (R. 263).

With respect to the motions addressed to the original complaint, the affidavits submitted in connection with the prayer for summary judgment were clearly pertinent. But a decision as to the sufficiency of that complaint is of no consequence if petitioners had a right to file the amended complaint. The circuit court of appeals found it unnecessary to pass upon this point (R. 269), but we think it clear that petitioners had such a right under Rule 15 (a).[8]

The significant decision therefore, is that relating to the amended complaint. As to that, respondents had moved for summary judgment only in the event that the court permitted the amendment to be filed. The district court did not do so, as we have shown. The district court accordingly did not act on the motion for summary judgment with respect to the amended complaint, so that the record upon which the court disposed of that complaint did not properly include the affidavits submitted on that motion but only the complaint itself.

---

[8] Rule 15 (a) states "A party may amend his pleading once as matter of course at any time before a responsive pleading is served * * *." Respondent's argument is that the motion to dismiss and for summary judgment addressed to the original complaint was a "responsive pleading" which cut off petitioners' right to amend without leave of court. We believe that this contention is unsound for the reason set forth on p. 12 of petitioners' brief.

Since that was the posture of the record on the motion addressed to the amended complaint in the district court, the same would be true on the appeal from the decision on that motion, both in the circuit court of appeals and in this Court.

If we are correct in our analysis, the record before the circuit court of appeals and this Court in so far as the amended complaint is concerned consists only of the complaint itself, the first portion of respondent's motion of January 14, and the order of the district court refusing to permit the filing of the amendment. Contrary to respondents' contention, the factual record would not encompass the affidavits on the motion for summary judgment.

The circuit court of appeals inferentially conceded that the district court was wrong in holding that the amended complaint "as it reads" failed to state a cause of action (R. 269). Since that determination was all that the appellate court had before it for review with respect to the amended complaint, it would appear that the case should have been remanded to the district court without more at that stage. The circuit court of appeals, however, went ahead and apparently treated the case as if a motion for summary judgment had been addressed to the amended complaint. Its opinion makes reference to the contracts attached as exhibits to the antitrust pleadings, which were in turn attached to the affidavits on the motion for summary judg-

ment. Predicating its conclusion on these facts[9] the court held that there had been no fraud within the meaning of the statute.

This determination and the question whether the amended complaint was sufficient on its face present the important questions in which the Government is interested. We shall accordingly deal in this brief not only with the amended complaint considered alone, but also with that pleading taken with the more precise charges in the antitrust material incorporated in the affidavits—the material upon which the circuit court of appeals based its decision.[10]

---

[9] The opinion did not rely on the version of the facts set forth in respondents' affidavits, which were, in vital parts, contraverted by the antitrust pleadings.

[10] Respondents contend that the record with respect to the amended complaint includes the affidavits on the motion for summary judgment and that petitioners' affidavits, not being based upon personal knowledge, are incompetent to traverse the allegations in respondents' affidavits. The indictment, complaint, and bills of particulars in the antitrust cases, which are attached to the affidavits as exhibits, are regarded by respondents as hearsay and therefore inadmissible for purposes of the motion for summary judgment. It is true that such documents would not be admissible at a trial as evidence of the facts stated therein. But we do not concede the correctness of respondents' argument that under Rule 56 of the Federal Rules of Civil Procedure only its affidavits could properly be considered by the trial court on the motion for summary judgment. It would, indeed, be a perversion of the summary judgment rule to hold that self-serving declarations of alleged conspirators can establish the absence of any triable issues of fact in the face of contrary allegations contained in a grand-jury indictment, sufficient for the institution of a criminal prosecution and in fact constituting an

II

RESPONDENTS' AGREEMENTS NOT TO BID AGAINST EACH OTHER CONSTITUTED FRAUD WITHIN THE MEANING OF R. S. 5438 EVEN APART FROM THE PROTECTIVE OFFERS DISCLOSED IN THE ANTITRUST PLEADINGS

The amended complaint alleged that respondents had presented claims to the United States upon contracts procured in the course of a conspiracy between respondents that only Bausch & Lomb would compete for contracts with the United States.[10a] The antitrust material brought forward

affidavit by the grand jurors that there are reasonable grounds to believe the allegations contained therein. Indeed, acceptance of respondents' argument in this regard would always enable fraudulent conspirators to overcome actions under R. S. 5438 by motion for summary judgment where they were the only ones with "personal knowledge" of the incriminating facts. Furthermore, in this case, exhibits "U" and "V" (R. 188–193) to the Government's bill of particulars, incorporated in petitioners' affidavits, would seem to constitute admissions by respondents, admissible in evidence, raising issues of fact *vis a vis* respondents' denial that there had been any allocation of territory since 1926.

[10a] Respondents urge that there is nothing in the record to indicate that competitive bids were ever submitted in connection with the alleged conspiracy. But the amended complaint charged that Bausch & Lomb, pursuant to the conspiracy, submitted bids to the United States for military optical equipment at prices "represented to be * * * competitive," but not competitive in fact, and that the United States accepted such bids in ignorance of the conspiracy and in the belief that the prices were competitive (R. 82). Particularly on demurrer, this would seem a sufficient allegation of the submission of competitive bids, and the court below evidently considered the case in that light. See also note 24, *infra*.

in the affidavits also disclosed that Zeiss agreed to make "protective offers"—spurious bids at a higher figure than the contemplated quotation of Bausch & Lomb. But even considering the amended complaint alone, we submit that it sets out a conspiracy fraudulent within the meaning of R. S. 5438, regardless of whether the conspiracy was implemented by the making of protective offers.

A. R. S. 5438 does not require that a common law case of deceit be made out

Under the lower court's construction that R. S. 5438 uses fraud "in its accepted sense of deceit," the incidence of protective offers in a collusive bidding scheme assumes a wholly unwarranted significance in the determination of the existence of a triable cause of action under the statute. In our view that construction is untenable on practical grounds, finds no adequate justification as a matter of legal principle, and is at odds with the legislative history of the statute in question.[11]

The artificiality of the lower court's thesis is at once apparent in terms of the very distinction which it sought to draw between the situation in the case at bar and that in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. Although the purpose and effect of the conspiracy would be precisely the same in both cases, no liability would

[11] We believe that even by the rigid standards of common law fraud, the amended complaint was adequate under R. S. 5438. See pp. 30–34, *infra*.

follow if the collusive bidders were sophisticated enough to limit the conspiracy to the selection of one of their number to make the desired bid, avoiding the submission of any "protective" bids, whereas liability would attach if the conspirators were sufficiently careless or unwary to submit one or more graduated bids above the predetermined "low bid." Such a distinction "cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute." Cf. *United States* v. *Trinidad Coal Company,* 137 U. S. 160, 166. In dealing with a very similar situation, this Court declared, in *McMullen* v. *Hoffman,* 174 U. S. 639, 651, "Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is."

Nor do we see any adequate justification in terms of legal or judicial precedent for the lower court's summarily stated conclusion that R. S. 5438 uses fraud "in its accepted sense of deceit." The fallacy of this assumption (cf. *Ropner & Co.* v. *Emmons Coal Mining Corp.,* 17 F. (2d) 386, 388 (E. D. Pa.)) is apparent from the fact that fraud is used in case and statute law in a wide variety of senses, of which common law deceit (*Ming* v. *Woolfolk,* 116 U. S. 599, 602–603; see *Pence* v. *United States,* 316 U. S. 332, 338) is only one and seemingly the most restricted. It is used in different and generally broader senses, for example, in equity (*Moore* v. *Crawford,* 130 U. S.

122, 128; *Graffam* v. *Burgess,* 117 U. S. 180, 189, 192); in the Bankruptcy Act (*Ames* v. *Moir,* 138 U. S. 306); and in Section 37 of the Criminal Code (18 U. S. C. § 88). *Haas* v *Henkel,* 216 U. S. 462, 479–480; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *Curley* v. *United States,* 130 Fed. 1, 8 (C. C. A. 1), certiorari denied, 195 U. S. 628. The latter statute, of course, deals with frauds against the United States and thus is of particular importance here. See also *United States* v. *Plyler,* 222 U. S. 15. Likewise, the "fraud" condemned by the mail frauds statute is broader than the common law tort of deceit and the ancient crime of false pretenses.[12] Certainly, then, there is no basis for assuming in the abstract that the statute uses "fraud" in any particularized sense.

Moreover, the lower court's application of fraud "in the sense of deceit" withdraws from the statute a type of agreement which the courts have traditionally condemned as fraudulent. Thus, "It is well settled that an agreement between intend-

[12] *United States* v. *Groves,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670. See *Bradford* v. *United States,* 129 F. (2d) 274 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Pandolfo* v. *United States,* 128 F. (2d) 917 (C. C. A. 10), certiorari denied, 317 U. S. 651; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 315 U. S. 574. See also the briefs for the United States in opposition to petitions for writs of certiorari in *Glover* v. *United States,* 316 U. S. 690, and *McDermott* v. *United States,* certiorari denied, 318 U. S. 765.

ing bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside." *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (C. C. A. 6), affirmed, 175 U. S. 221; *Parker* v. *New England Oil Corporation*, 13 F. (2d) 158, 172–174 (D. Mass.); *Woodruff* v. *Berry*, 40 Ark. 251 (1882); *Swan* v. *Chorpenning*, 20 Cal. 182 (1862); *City of Oakland* v. *California Construction Company*, 15 Cal. (2d) 573 (1940); *Finley Method Co.* v. *Standard Asphalt Co.*, 104 Fla. 126 (1932); *Ray & Whitney* v. *Mackin*, 100 Ill. 246 (1881); *Hunter* v. *Pfeiffer*, 108 Ind. 197 (1886); *Whalen* v. *Harrison*, 26 Mont. 316 (1902); *Gulick* v. *Ward*, 10 N. J. L. (5 Halst.) 87 (1828); *Constructors Ass'n of Western Pennsylvania* v. *Seeds*, 142 Pa. Super. 59, 15 A. (2d) 467 (1940). Likewise the courts have long similarly denounced as fraudulent agreements to stifle competitive bidding at public or private auction sales. *Slater* v. *Maxwell*, 6 Wall. 268, 277; *Singer Mfg. Co.* v. *Yarger*, 12 Fed. 487 (C. C. D. Ia.); *Nash* v. *Delinquent Lands*, 111 Ark. 158 (1914); *Fleming's Heirs* v. *Hutchinson*, 36 Ia. 519 (1873); *Lloyd* v. *Malone*, 23 Ill. 43 (1859); *Federal Land Bank of New Orleans* v. *Green*, 11 La. App. 257, 123 So. 463 (1929); *Fulgham* v. *Burnett*, 151 Miss. 111 (1928); *Morris* v. *Wood-*

ward, 25 N. J. Eq. 32 (1874); *Nash* v. *Elizabeth City Hospital Co.,* 180 N. C. 59 (1920); *Whitaker* v. *Bond,* 63 N. C. 290 (1869); *Toole* v. *Johnson,* 61 S. C. 34 (1901); *Lohr* v. *George,* 65 W. Va. 241 (1909).[18] In the light of this judicial characterization of similar practices as fraudulent, there is no basis for the refusal of the court below to hold that such agreements are "fraudulent" within the meaning of R. S. 5438. We can only assume that the lower court was guided to a contrary result by its distaste for "the odious * * * *qui tam* action" (R. 269). But since *Marcus* v. *Hess,* that seems clearly to be a legislative problem.

---

[18] American Law Institute, Restatement of Contracts, states the matter this way (Sec. 517):

"A bargain not to bid at an auction or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal.

"*Comment* * * * such a bargain, if made merely for the purpose of preventing competition and reducing the price of what is to be sold, is against public policy because operating as *a fraud* on the party offering it, and therefore illegal." [Italics supplied.]

That secret combinations not to bid have been uniformly regarded as fraudulent is also indicated by the leading secondary authorities. 3 Pomeroy, *Equity Jurisprudence* (5th Ed. 1941) § 934 (d); 5 Williston on Contracts (Rev. Ed. 1936), § 1663; 1 Story, *Equity Jurisprudence* (14th Ed. 1918), § 411; 2 Freeman, *Executions* (3d Ed. 1900), § 297; 3 Cooley, *Taxation* (4th Ed. 1924), § 1425; Black, *Tax Titles* (2d Ed. 1893), § 246; Kleber, *Void Judicial and Execution Sales,* § 360; 3 McQuillin, *Municipal Corporations* (Rev. Ed.), §§ 1326, 1348.

Nor can the lower court's interpretation of the statute be reconciled with its legislative history, which argues for the broadest possible construction. The provisions found in Section 3490–3493, and in Section 5438 of the Revised Statutes were included in an Act passed by Congress on March 2, 1863, entitled "An Act to Prevent and Punish Frauds upon the Government of the United States" (12 Stat. 698). The sponsors and proponents of the bill, in urging its passage, stated that its purpose was to eliminate "frauds and corruptions" practiced upon the United States and to prevent conspiracies formed for the purpose of "defrauding and plundering the Government." Cong. Globe, 37th Cong., 3d Sess., p. 952." A Congressional committee on Government contracts, after spending almost a half year investigating frauds in the procurement of war contracts, published a report and hearings extending over more than 1,600 pages. The report of the committee and the debates in Congress make it

[14] That the fraudulent nature of agreements not to bid was recognized in 1863 is indicated by cases and secondary authorities prior to that time. *Swan* v. *Chorpenning*, 20 Cal. 182 (1862); *Spencer* v. *Champion*, 13 Conn. 10, 18–19 (1838); *Loyd* v. *Malone*, 23 Ill. 43, 48; 74 Am. Dec. 179 (1859; *Troup* v. *Wood*, 4 Johns. Chan. 228 (N. Y. Sup. Ct. 1820); *Smith* v. *Greenlee*, 13 N. C. (2 Dev.) 126, 18 Am. Dec. 564 (1829); *Noyes* v. *Day*, 14 Vt. 384 (1842); and see also Story, *Equity Jurisprudence* (1st Ed. 1849), § 293, and 2 Kent's *Commentaries* (7th Ed. 1851), p. 701.

apparent that "fraud" was considered to include any scheme or artifice whereby the United States was deprived of fair value. H. Rep. No. 2, 37th Cong., 2d. Sess., pp. 36–37, 68, 83, 128; Cong. Globe, 37th Cong., 1st Sess., Appendix, pp. 134–136 (1862); Cong. Globe, 37th Cong., 3d Sess., p. 198.

In this setting it is difficult to accept the lower court's hypothesis that Congress, by using the words "false" or "fictitious" in the disjunctive with the word "fraudulent," intended to restrict the coverage of the statute to cases of common-law deceit. Rather, as the "Senatorial sponsor of this bill broadly asserted * * * its object was to provide protection against those who would 'cheat the United States'"[15] (*United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 544). In short, the indicated construction is that in referring to "fraudulent" claims, the statute means no more than claims infected by a design to cheat the United States, without restriction to any particular kind of cheat. Viewing the statute in its intended focus, there is no room for drawing any distinctions between its application to collusive bidding schemes which involve protective offers and to those which do not. The *form* of the scheme to cheat the United States should not be determinative of the existence of a fraud. Any formalistic definition of what constitutes fraud

[15] Cong. Globe, 37th Cong., 3d Sess., p. 952.

can only tempt man's demonstrated ingenuity in circumventing legal barriers.

We submit that petitioners' amended complaint stated a good cause of action against respondents.

B. *The elements of common law fraud were present*

Even if we accept the view of the court below that R. S. 5438 uses fraud in the sense of common-law deceit, we believe that an agreement not to bid violates the statute.

An agreement by competitors not to bid against each other can have only one object—the stifling of competition as a means of obtaining higher prices than could otherwise have been obtained in the course of competitive bidding. The invalidity of such compacts is based on the common knowledge that "men with these agreements in their hands, and relying upon them for gain, do not act toward the public and third persons as they would without them, under the stimulus of competing opposition." See *Atcheson* v. *Mallon*, 43 N. Y. 147, 150–151 (1870). See also Restatement of Contracts (American Law Institute) § 517, Comment b.

The gist of the common-law action for fraud and deceit "is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within

the knowledge or reach of the plaintiff." *Stewart v. Wyoming Ranche Co.*, 128 U. S. 383, 388; cf. *Tyler* v. *Savage*, 143 U. S. 79, 98–99; *Strong* v. *Repide*, 213 U. S. 419, 431–433; *Equitable Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, 424 *et seq.*

The purpose of the United States in seeking bids instead of subjecting itself to the hazards of the market is to secure to the Government the benefits which flow from competition and to enable it to secure the lowest price obtainable. *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 126. The concealed collusive action of prospective bidders [16] has the effect of destroying the conditions under which the United States believes that it is transacting business. Such action, had it been known, would have justified the United States in a refusal to deal (39 Op. A. G. 71, 93), and obviously constitutes the concealment of a material fact.

An invitation for bids necessarily indicates an expectation that there will be free and open competition; and one who bids in response to that invitation in effect represents that his bid is free

[16] With reference to the argument that the bidder abstaining might have done so anyway, the fact that the agreement was considered necessary speaks for itself. Cf. *Thompson* v. *Davies*, 13 Johns. (N. Y. 1816) 112, 115:

"In none of the cases cited was the party bound to bid; but, being at liberty to bid, he suffered himself to be bought off, in a way which might prevent a fair competition. The abstaining from bidding, upon concert, and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress."

and open. If by virtue of his own secret agreement to suppress competition, the bid does not possess those qualities, he has concealed a defect in his bid, and thus has created "a false impression covering up the truth" to induce action on the apparent situation—the gravamen of the tort action of deceit.[17] Had the bids in the instant case been accompanied by a representation that Bausch & Lomb had done nothing to detract from the free and competitive nature of the bid, the elements of deceit would have been more obvious; and fraud can rest as easily upon the concealment of a material fact as upon an express denial of such fact. *King* v. *International Lumber Co.*, 156 Minn. 494, 497 (1923).

Consequently, the submission of a bid in answer to an invitation for competitive bids, which the bidder knows he has in fact made noncompetitive and which the bidder realizes is a fact not known to the other party—is as much a misrepresentation to induce action prejudicial to the other as the drawing of a check with the knowledge that there are no funds behind it.[18] Additional analogies are readily found, where silence as to a material fact, which if known may induce action less favorable

[17] Prosser, *Handbook of the Law of Torts* (1941), p. 721; see *Mudsill Min. Co.* v. *Watrous*, 61 Fed. 163, 168 (C. C. A. 6).

[18] *Eastern Trust & Banking Co.* v. *Cunningham*, 103 Me. 455 (1908); *Sieling* v. *Clark*, 18 Misc. 464, 41 N. Y. S. 982 (1896).

to the person concealing the information, is held to constitute actionable fraud.[19]

In short, the concealment by Bausch & Lomb, when it submitted its bids to the United States for military optical equipment, of its agreement with Zeiss that Zeiss would not compete with such bids, was the "suppression of material facts" not within the knowledge of the Government. It is therefore submitted that even upon the lower court's standard of common-law deceit, a contract awarded upon an invitation for bids is fraudulent if obtained as a result of a secret agreement between two competitors that only one would submit bids to the United States. It follows that any claims submitted thereon by respondents were "false or fraudulent" claims within the meaning of R. S. 5438.

III

THE AGREEMENTS NOT TO BID COUPLED WITH THE PROVISIONS FOR PROTECTIVE OFFERS, CONSTITUTED A FRAUD UPON THE UNITED STATES

The court below treated the motion for summary judgment as directed against the amended

---

[19] The purchase on credit by an insolvent: *Gillespie* v. *J. C. Piles & Co.*, 178 Fed. 886, 891 (C. C. A. 8); *In re Meiselman*, 105 F. (2d) 995, 998 (C. C. A. 2); *Baldwin* v. *Childs*, 249 N. Y. 212 (1928); see *Evans* v. *United States*, 153 U. S. 584, 592; *Donaldson* v. *Farwell*, 93 U. S. 631.

Compare the quasi-contractual right to recover the reasonable value of charitable services against one who sought them while concealing the fact that he was a man of means. *In re Agnew's Will*, 132 Misc. 466, 230 N. Y. S. 519 (1928); see (1929) 29 Col. L. Rev. 95; (1929) 42 Harv. L. Rev. 283.

complaint, and looked to the antitrust pleadings attached to the affidavits for the uncontraverted facts upon which it predicated its conclusion. If the record is so viewed the respondents are shown to have supplemented their agreement not to bid against each other with a plan for the making of "protective offers" where the former would not be adequate. If this fact is considered, the distinction between the present case and *Marcus* v. *Hess* upon which the court below relied completely vanishes.

A. The "protective offer" feature of the conspiracy establishes fraud under R. S. 5438

Read in the light of the antitrust indictment, which, together with its actual bills of particular, constituted in effect a bill of particulars in the case at bar, the amended complaint charged the concoction and execution of substantially the same kind of collusive bidding conspiracy which was condemned recently in *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, and long ago in *McMullen* v. *Hoffman,* 174 U. S. 639. Contrary to the assumption made by the court below, the conspiracy charged did not stop short with an arrangement that respondent Bausch & Lomb would not compete for sales to countries outside the United States and that Zeiss would not compete for sales to the United States. Rather, the charge was that the conspiracy, notwithstanding the 1926 agreement, contemplated in addition that, "In the case of inquiries received by Bausch &

Lomb from authorities outside the United States of America, by Carl Zeiss from the *authorities of the United States,* one party informs the other and is obligated to make the protective offer named by the other party"[20] such protective offer to contain a markup of up to 20% "over the normal price," designed to throw the business to the other party, and to be paid to the other party if the protective offer was accepted (R. 96–97, 154).

The amended complaint and the incorporated antitrust material further alleged that since 1921, Zeiss refused to sell military optical equipment to the United States without Bausch & Lomb's consent; that on various occasions since 1925, Zeiss offered to sell such equipment for use in the United States with the consent of Bausch & Lomb at "arbitrary, artificial, unreasonable and noncompetitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98);[21] and that pursuant to the conspiracy, respondents obtained contracts at, and exacted payment of, such noncompetitive prices from the Government of the United States (R. 99).

Clearly, the conspiracy thus charged is indistinguishable in substance from that denounced in

---

[20] R. 154. [Italics supplied.]

[21] The bill of particulars addressed to Bausch & Lomb in connection with the indictment contains at least two documents, exhibits "U" and "V," tending to corroborate this charge and the charge that the 1926 agreement was merely one of form and not of substance. See R. 188–192, 193. See p. 14, note 7, *supra.*

United States ex rel. Marcus v. *Hess*, 317 U. S. 537. The collusive bidding arrangement in the *Hess* case was aimed, at least in the first instance, at the municipality constructing the PWA project; the conspiracy here, dealing as it did with military instruments, was even more clearly directed against the United States, and this is made doubly clear by the express reference in the 1925 agreement to the submission of protective offers where inquiries were received from the "authorities of the United States" (R. 154). At least one obvious purpose of the scheme was to obtain more money from the United States for the conspirators' equipment than would have been received if they had remained in honest competition.[22] And the protective offers here were designed with the same motive as the collusive bids in the *Hess* case.[23] In short, the conspiracy here was infected with the very kind of fraud found in the *Hess* case, and "did not spend itself with the execution of the contract. * * * The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded." *United States ex rel. Marcus*

[22] Whether this was the paramount object of the conspiracy is not material. Cf. *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. 81, 96–97.

[23] Any protective offers made by Zeiss are, of course, equally chargeable to its co-conspirators. Cf. *Lincoln* v. *Claflin*, 7 Wall. 132, 138.

v. *Hess*, 317 U. S. 537, at 543–544;[24] see also *McMullen* v. *Hoffman*, 174 U. S. 639, 652–653.

B. *The "protective offer" feature of the conspiracy establishes fraud even under the lower court's construction of R. S. 5438*

Holding that R. S. 5438 uses fraud "in its accepted sense of deceit," the lower court distinguished the facts in *United States ex rel, Marcus* v. *Hess*, 317 U. S. 537, then in an intermediate stage (137 F. (2d) 233 (C. C. A. 3)), on the ground that the collusive bidders, in addition to the predetermined low bid, put in other and higher bids. The court below stated (R. 268):

---

[24] Respondents' attempt to distinguish the *Hess* case on the ground that the record here does not show that they obtained any contracts pursuant to competitive bidding is pointless. We believe the amended complaint sufficiently alleged that competitive bids were involved (see note, 10a, *supra*) and surely the Government is equally victimized whether the collusion is effected in relation to purchases made pursuant to public competitive bidding, or to purchases made by negotiations in which quotations are requested from selected suppliers. In fact, collusive suppression of competition adversely affects the United States even where only one bid is solicited.

Indeed, the legislative history of R. S. 5438 reveals that one of the principal factors which gave rise to the statute was the fear that the Government was particularly exposed to fraud because in the exigencies of war its purchases were being made without the benefit of competitive bidding, so that sellers were not subject to the pressure of competition. See Cong. Globe, 37th Cong., 1st Sess., p. 405; Cong. Globe, 37th Cong., 2d Sess., pp. 116, 711–712, 1054.

In any event, there is nothing to suggest that respondents did not mean their agreement to apply to contracts let by the United States through public competitive bidding.

> To put in such bids was a deceit, for the bidders intended that the bids should not be accepted, although by the act of bidding they represented that they hoped to succeed.

Even assuming, *arguendo,* that R. S. 5438 uses fraud in the sense of common-law deceit, the protective offer provisions of respondents' scheme would bring the case within "deceit" as thus defined by the court below. The court necessarily overlooked or ignored the "protective offer" feature of respondents' conspiracy, in distinguishing the *Hess* case. The prime purpose of the protective offers was to throw the contract to the other party, if possible (R. 96). Taking this feature into account, the conspiracy here is both on all fours with that in the *Hess* case and meets the lower court's requirement of deceit.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court below should be reversed.

CHARLES FAHY,
Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

K. NORMAN DIAMOND,
BONNELL PHILLIPS,
ELIHU SCHOTT,
PHILIP MILLER,
ROBERT L. STERN,
Attorneys.

OCTOBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

PETITION FOR RE-HEARING

INDEX

	Page
Statement of facts	4
Argument:	
I. The agreement between Bausch & Lomb to pay Zeiss the "royalties" operated as a fraud on the United States within the meaning of the False Claims statute	8
II. If summary judgment was granted against relators for the failure to come forth with admissible evidence, this judgment should be without prejudice to the United States	14
Conclusion	16

CITATIONS

Cases:	
Blount Mfg. Co. v. *Yale & Towne Mfg. Co.*, 166 Fed. 555	11, 13
Crawford v. *United States*, 212 U. S. 183	10
Crocker v. *United States*, 240 U. S. 74	10
Hovenden and Sons v. *Millhoff*, 83 L. T. R. 41	11
McMullen v. *Hoffman*, 173 U. S. 639	11
Parker v. *New England Oil Corp.*, 13 F. (2d) 158	11
Pittsburgh Dredging and Const. Co. v. *Monongahela & Western Dredging Co.*, 139 Fed. 780	11
United States v. *Baker-Lockwood Manufacturing Company, Inc.*, 138 F. (2d) 48	15
United States v. *Cooper Corporation*, 312 U. S. 600	13
United States ex rel. Marcus v. *Hess*, 317 U. S. 537	11, 15
Statute:	
False Claims statute, 31 U. S. C., Secs. 231–233	4
Miscellaneous:	
H. R. 1203, 78th Cong., 1st Sess.	2

562558—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA EX REL. MURRAY BRENSILBER AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF, PETITIONERS

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH, AND THEODORE B. DRESCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING BY THE UNITED STATES

The Solicitor General on behalf of the United States of America respectfully petitions the Court to grant a rehearing in this case.

This petition is submitted by the Government on its own behalf as the real party in interest and as the party aggrieved. The Government is not only interested to the extent of one-half the recovery herein, but, if legislation now pending in

Congress is passed, it may be permitted to take over the instant action and maintain it on its own behalf.[1] In addition, the Government is interested in several other actions now pending in the lower courts on which the decision herein has direct bearing.[2]

By this petition the Government seeks primarily to have this Court review one aspect of the case which, although raised in the pleadings and passed on *sub silentio* in the decision below, was not directly called to this Court's attention on the original argument. This phase of the case in-

---

[1] H. R. 1203. In conference, 78th Cong., 1st Session.

[2] As of September 28, 1943, records of the Department of Justice show that at least thirty-seven complaints had been filed by *qui tam* plaintiffs and at least sixty-four complaints had been filed by the United States on its own behalf under the False Claims statute. The damages sought by the *qui tam* plaintiffs, exclusive of penalties, total approximately $240,000,000 in 22 of these suits. The amount of damages sought in the remaining *qui tam* suits is not specifically known but is believed to be very high. The damages sought in most of the suits brought by the United States is not presently known but is likewise estimated at several hundred million dollars. Further, suits under the False Claims statute are being filed by the United States currently.

In many of these cases, while the United States has been defrauded, it cannot be said that the fraud was perpetrated by means of common law deceit in the "accepted sense" of that word, as the Circuit Court of Appeals suggested was necessary under the False Claims statute. These cases involve different types of frauds, including the bribery of Government officials in order to secure contracts, the sale to the Government of defective material, and the faking and falsification of tests in connection with the sale of material, as well as cases involving "common law deceit."

volves several hundred thousands of dollars which the Government should recover. It raises the same important issue of law as to the meaning of the False Claims statute which was presented on the merits by the petition for certiorari, without, we believe, being subject to the points made by respondents as to the inadequacy of petitioners' allegations and affidavits.

It is submitted that the petition should be granted for the following reasons:

(1) The record shows (at least sufficiently to present a triable issue of fact) the existence of an unlawful conspiracy between Bausch & Lomb and Carl Zeiss of Jena from 1921 to 1940[3] whereby the latter agreed not to compete with the former in the sale of military optical instruments to the United States and whereby Bausch & Lomb agreed to pay and did pay to Carl Zeiss of Jena, the parent of Carl Zeiss, Inc., a percentage of the sale price of *all* military optical instruments sold by it to the United States whether or not such instruments were covered in whole or in part by patents owned by Zeiss. This percentage was included in the price paid by the United States on instruments sold to it by Bausch & Lomb and is specifically identified in the record. (R. 143–144.) Whatever may be said of petitioners' case as a whole, the facts on this point are not in substan-

[3] Carl Zeiss, Inc., as a wholly owned subsidiary of Carl Zeiss of Jena, participated in this unlawful conspiracy from 1925, the date of its incorporation (R. 200).

tial dispute, and we do not believe that respondents' arguments as to the deficiency of petitioners' proof generally can be availed of in this connection.

This feature of the conspiracy was not called to the Court's attention on the original argument. It should be considered on reargument since it constitutes a clear case coming within the terms of the False Claims statute (31 U. S. C., Secs. 231–234).

(2) The respondents contended that summary judgment should be granted because the relators, the *qui tam* plaintiffs, failed to bring forth proof to establish the existence of "protective offers," or the continuance of the 1921 agreement beyond 1926. If the judgment was affirmed on this ground, it should be without prejudice to any action by the Government on its own behalf, since the Government should be permitted to submit proof to establish these facts.

STATEMENT OF FACTS

Since reargument is asked because the pertinency of certain material facts was not called to the Court's attention, it is necessary to make a very brief restatement of some of the facts involved.

Material facts which are undisputed are as follows:

(1) Prior to 1921 Bausch & Lomb and Carl Zeiss of Jena (hereinafter called "Zeiss") com-

peted both in the United States and elsewhere in the sale of both military and non-military optical instruments (R. 198).

(2) On April 28, 1921, Zeiss and Bausch & Lomb entered into a twenty-year contract whereby Zeiss agreed not to sell military optical instruments in the United States and Bausch & Lomb agreed not to sell such instruments outside the United States, without the other party's consent (R. 147, 149). In this contract the parties agreed to place at the disposition of each other their patents in the military field (R. 146, 148). Bausch & Lomb agreed to pay to Zeiss a "royalty" amounting to a specified percentage on all sales of military optical instruments made by it *whether or not such instruments were covered in whole or in part by patents owned by Zeiss* (R. 146). Zeiss had the option to acquire patent rights in Bausch & Lomb patents "not resulting from the Zeiss cooperation" at a payment of a four-percent royalty during the life of the patent (R. 148). In the case of non-military articles both parties remained in free competition and royalties on "new projects" in the non-military field were to be the subject of agreements (R. 147–148).

(3) This contract was modified on June 27, 1925, and October 28, 1925, by the inclusion of the so-called "protective offer" features (R. 151–156). The facts as to this feature of the case have been adequately stated in the main briefs, and we

do not urge them herein as additional grounds for reargument.

(4) On November 26 and December 24, 1926, Zeiss and Bausch & Lomb entered into a new contract purporting to supersede the original contract, but covering the same contractual period (R. 157–161). This contract did not continue the "protective offer" feature and did not include an express provision providing for the division of the world market on military optical instruments. However, the contract provided that the parties would remain in unrestricted competition in the *non*-military line (R. 159) and that they would give "due consideration" to one another's interests in the military line (R. 159). The use of Zeiss patents and drawings in the military line by Bausch & Lomb were expressly restricted to the United States, and paragraph 7 provided that Bausch & Lomb should make available to Zeiss patents in the military line which Bausch & Lomb obtained through its own efforts "for the markets outside of the United States" (R. 160). In this contract, in substantially the same words as in the 1921 contract, Bausch & Lomb continued to agree to pay to Zeiss "royalties" on its total sales in the military line (except field glasses) whether or not the instruments sold by Bausch & Lomb were covered in whole or in part by Zeiss patents (R. 158).

(5) Since 1921, Zeiss and its subsidiaries, Carl Zeiss, Inc. (defendant herein) and Nedinsco, have

refused to sell military optical instruments directly to the United States, at least without the consent of Bausch & Lomb (R. 138–140, 106, 203, 224). The defendants admit that "royalty" payments up to seven percent on all military instruments sold by Bausch & Lomb in the United States were paid to Zeiss (R. 28). For the years 1936 to 1938 these payments amounted to $109,988.95, plus taxes (R. 144).

(6) The complaints herein (R. 6, 80–81) and the indictment in the antitrust suit allege that the agreement to divide the world market on military optical instruments was continued beyond 1926 and up to the time of the indictment (R. 105). Examination of respondents' carefully drawn affidavits discloses that they do not affirmatively deny the continuance of the agreement not to compete. The parties seemed to construe the provisions in the agreement of 1926, referred to in paragraph (4), *supra,* as an agreement not to compete in the military line (R. 186–187). On several occasions since 1926 Bausch & Lomb refused to sell military optical instruments outside the United States without the consent of Zeiss (R. 121–138). Since 1926 Zeiss and its subsidiaries on several occasions have refused to sell military optical instruments to the United States without the consent of Bausch & Lomb (R. 44, 138–140, 106, 203, 224).

The normal inference from these facts is that the agreement not to compete continued in force

beyond 1926 and that its effect was to increase the Government's payments to Bausch & Lomb for military optical instruments by at least the amount of the "royalties" payable to Zeiss. At the very least there is a triable issue of fact as to this issue.

ARGUMENT

I

THE AGREEMENT BETWEEN BAUSCH & LOMB TO PAY ZEISS THE "ROYALTIES" OPERATED AS A FRAUD ON THE UNITED STATES WITHIN THE MEANING OF THE FALSE CLAIMS STATUTE

The mere statement of the nature of the agreement entered into between Bausch & Lomb and Zeiss in 1921 and in 1926 shows the existence of a conspiracy, the primary purpose and effect of which is to cheat the United States by causing it to pay excessive prices for military optical instruments. The defendants do not deny that they entered into a contract in 1926 whereby Bausch & Lomb agreed to pay "royalties" on *all* military optical instruments sold by Bausch & Lomb to the United States, whether or not such instruments were covered in whole or in part by patents owned by Zeiss. The defendants do not deny, indeed they affirmatively assert, that since 1926 Carl Zeiss, of Jena, through its wholly owned subsidiaries, refused to sell military optical instruments to the United States directly. The effect of the foregoing agreements is clear. Of neces-

sity, they operated not only to deprive the United States of the advantage of competitive bidding between Bausch & Lomb and Zeiss but to cause the United States to pay Bausch & Lomb excessive amounts for instruments by at least the amount of the so-called "royalties" which Bausch & Lomb paid over to Zeiss.

The word "royalty" as descriptive of these payments is a misnomer.[4] The payments to Zeiss

[4] On the original argument Mr. Justice Frankfurter asked counsel whether the original German texts of the underlying agreements were in the record. It was stated that they were not. The printed record does not contain the original texts of the 1921 or the 1926 agreements but only the translations. The German texts were, however, incorporated by reference in the affidavits in support of the motion. The original texts appeared in the bill of particulars annexed to the indictment referred to in Mr. Eisenhart's affidavit as Exhibits A and E (R. 145, 156). Photostatic copies of the original texts have now been filed with this Court.

These original texts are important and should be considered by this Court. It should be noted that while the translation uses the word "royalty" for the payments to be made by Bausch & Lomb, the original German word is "Abgabe." While untechnically the word "Abgabe" may be translated as a "royalty" the technical German word for royalty would be "lizenzgebuehr" or "lizenz" payment. Indeed, when speaking of the payments Zeiss is to make to Bausch & Lomb, under paragraph 7, for the latter's technical assistance and patents in the military line, the 1926 agreement refers to a "4% ige lizenz." The word "Abgabe" should not have been translated as "royalty" but as implying "an agreement to divide income," which we respectfully submit is the truer meaning of the word "Abgabe" in the context in which it was used in these agreements. This lends additional weight to the government's contention that the 1926 agreement was not in reality an agreement for the payment of "royalties" by Bausch & Lomb to Zeiss but was in effect and intent an

were not restricted to royalties on patents owned by Zeiss (R. 99, 143). On the contrary, under the contracts the specified payments were payable on unpatented instruments, on instruments covered by patents owned by Bausch & Lomb alone, on instruments covered by patents owned by Bausch & Lomb and Zeiss in common, and indeed would seem even to cover instruments developed by Bausch & Lomb and the Navy Bureau of Ordnance.[5] These so-called "royalties" operated as nothing more nor less than the consideration given to Zeiss by Bausch & Lomb to refrain from competing with Bausch & Lomb in the sale of military optical instruments in the United States. The effect of this agreement was the same as if Bausch & Lomb had given to Zeiss a share of the profits on these sales in order to prevent Zeiss from competing. The effect of these payments "would naturally, if not necessarily, result in defrauding the United States by causing to to pay more" (*Crocker* v. *United States*, 240 U. S. 74, 81; *Crawford* v. *United States*, 212 U. S. 183, 192) by at least the amount of the "royalties". This would

agreement for the division of income and the consideration for which Zeiss agreed to refrain from competing with Bausch & Lomb in sales to the United States. At least we believe this can be established on a trial of this action.

[5] In the brief submitted on behalf of respondent Bausch & Lomb it was pointed out that prior to 1921 Bausch & Lomb developed a range finder with the aid of the Navy Bureau of Ordnance (Brief for respondent, pp. 32–33). Even on such instruments Bausch & Lomb would pay a "royalty" to Zeiss under the terms of the 1926 agreement.

be the inference normally to be drawn from the payment itself; certainly, despite respondents' denial (R. 27), these facts raise a triable issue as to the existence of damage to the United States, whether or not they establish a conclusive presumption as to the minimum amount.*

Under this view of the case the conspiracy herein operated as a fraud on the United States within well settled rules. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537; *McMullen* v. *Hoffman*, 174 U. S. 639; *Pittsburgh Dredging and Const. Co.* v. *Monongahela & Western Dredging Co.*, 139 Fed. 780 (C. C. W. D. Pa.); *Parker* v. *New England Oil Corp.*, 13 F. (2d) 158, 173–174 (D. Mass.) *Cf. Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909).

The defendants did not deny the payments of the "royalties." In the brief submitted on behalf of respondents Bausch & Lomb the following statement is made (page 31):

> There is no dispute that the 1926 agreement required payment to Zeiss of certain royalties for the patent and other rights granted to Bausch & Lomb by the 1926 agreement. These were the only payments made to Zeiss by Bausch & Lomb in connection with any transaction with the United States (R. 28). Petitioners do not appear to challenge these royalty payments, nor could they.

* The English Court of Appeal has indicated that at least the amount of an unlawful payment must be presumed to have been passed on to the purchaser. *Hovenden and Sons* v. *Millhoff*, 83 L. T. R. 41 (1900).

The last statement was not entirely accurate, for, while petitioners' briefs did not challenge the "royalty" payments specifically, they were challenged in the complaints and in the supporting documents. The amended complaint specifically makes the payment of these "royalties" a basis of the cause of action (R. 81). The original complaint states that as a result of the conspiracy the defendants sold instruments to the United States at arbitrary, artificial, and unreasonable prices and received payments therefor which they divided among themselves in accordance with the agreements (R. 6). The indictment, which was submitted in connection with the motion for summary judgment on the original complaint, points out that the so-called "royalties" were paid on *all* instruments sold to the United States by Bausch & Lomb, whether or not covered by Zeiss patents (R. 96).

The final decree entered in the equity antitrust suit held that the payment of these "royalties" was unlawful and enjoined the payment of royalties until further order of the Court[7] (R. 246). The Circuit Court of Appeals likewise recognized that the contract between Bausch & Lomb and Zeiss for the division of the market and the payment of these "royalties" was admittedly unlaw-

[7] The Decree, dated July 9, 1940 (R. 246), stated:

"* * * The Agreement between Bausch & Lomb Optical Company and Carl Zeiss, dated at Rochester, November 26, 1926, and at Jena, December 24, 1926, is hereby declared

ful. The court ruled, however, that there had been no fraud on the United States because no representation to the United States had been made by Bausch & Lomb. As indicated herein, whether or not Bausch & Lomb made any representations to the United States, the natural effect of the unlawful agreement would be to inflate the bids by at least the amount of the "royalties" to be paid to Zeiss while Zeiss did not compete. The United States was unquestionably cheated and defrauded to this extent.

To hold that this type of fraud does not come within the False Claims statute is not only contrary to the language and purpose of that act but leads to a result plainly contrary to public policy. Under the holding of this Court in *United States* v. *Cooper Corporation,* 312 U. S. 600, the United States could not recover in a civil action under the Sherman Act the amounts by which it had been damaged by reason of the unlawful conspiracy between Bausch & Lomb and Zeiss. Further,

---

unlawful, and the further execution and performance of the same having heretofore become impossible and the said agreement having heretofore been suspended, the defendant Bausch & Lomb Optical Company is enjoined from carrying out any of its provisions, *including the payment of any royalties thereunder until the further order of this Court*; provided, however, that nothing herein contained shall be construed to affect the rights of Bausch & Lomb Optical Company under any patents for the manufacture of military optical instruments." [Italics supplied.]

See *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909).

the amounts by which the United States has been damaged may not be recoverable in a common law action under the holding of the Circuit Court of Appeals that there is no action on these facts for common law deceit. Thus whatever "royalties" previously collected from the United States were payable by Bausch & Lomb to Zeiss at the time of the equity decree would be retained by Bausch & Lomb. If it is held that these facts do not constitute a false, fraudulent, or fictitious claim under the False Claims statute, the wrongdoer will be permitted to profit by this amount and the United States may be powerless to recover against an admitted wrongdoer the amounts by which it has been damaged. Congress could not have intended such a result.

We respectfully submit that reargument should be granted in order that this Court may reconsider this phase of the case. If deficiencies may have been thought to exist in the record on the aspects of the case presented on original argument, they are not applicable to the facts to which we have called attention.

II

IF SUMMARY JUDGMENT WAS GRANTED AGAINST RELATORS FOR THE FAILURE TO COME FORTH WITH ADMISSIBLE EVIDENCE, THIS JUDGMENT SHOULD BE WITHOUT PREJUDICE TO THE UNITED STATES

On the original argument the respondents urged that summary judgment was properly granted below because the relators had failed to submit ad-

missible evidence to contravene the evidence submitted in the affidavits of Messrs. Eisenhart, Bausch, and Drescher in support of respondents' motions (see Brief on behalf of respondents Bausch & Lomb, pp. 13–22). The respondents further urged that the relators offered no admissible evidence to show the submission of any "protective offers" by Zeiss or its subsidiaries.

In view of the fact that the Government is the party aggrieved, and the real party in interest, if the judgment were affirmed because of the failure of the relators to submit evidence to prove these issues, this affirmance should be without prejudice to the United States. At the very least, the Government should be given the opportunity to bring its own action and prove its own case.[8] It would be contrary to the public interest and to the intent of the False Claims statute to permit a conclusive judgment to be rendered in favor of admitted wrongdoers merely because a *qui tam* plaintiff failed to bring forth any evidence on a motion for summary judgment. Whatever the rule might be if there had been a trial, the Government should not be precluded from bringing forth evidence on

[8] The action herein was commenced prior to the decision of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537. Since that decision the Government has commenced several actions on its own behalf under the False Claims statute and has brought actions in its own name where there were actions previously commenced by *qui tam* plaintiffs (see *United States* v. *Baker-Lockwood Manufacturing Company, Inc.*, 138 F. (2d) 48 (C. C. A. 8)).

its own behalf solely because there has been a default, albeit unintentional, by a relator on a motion for summary judgment. To hold otherwise might result in serious losses to the Government either through inadequate representation or through collusion.

The affirmance by an evenly divided court may be construed by lower courts as being based on the substantive issue of the construction of the False Claims statute, and with prejudice to an action by the United States. In view of the importance of the issue involved we respectfully urge that rehearing be granted so that if the affirmance was on the ground that the *qui tam* plaintiffs failed to bring forth evidence to substantiate the complaints the Court may clarify the status of a suit by the United States.

CONCLUSION

Wherefore, it is respectfully requested that a rehearing be granted, or, if the Court deny a rehearing, that the judgment be declared to be without prejudice to the interests of the United States.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

DECEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

IN THE

Supreme Court of the United States

October Term, 1943

No. 21

UNITED STATES OF AMERICA, Ex Rel. MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER On Their Own Behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

---

PETITION FOR REHEARING

Petitioners, having received the "Petition for Rehear-

ing by the United States," hereby adopt the grounds for rehearing stated therein and respectfully petition the Court to grant a rehearing in this case.

Respectfully submitted,

HOMER CUMMINGS,
WILLIAM STANLEY,
Counsel for Petitioners

I certify that this petition is presented in good faith and not for delay.

WILLIAM STANLEY,
Counsel for Petitioners

December, 1943.

No. 21. UNITED STATES EX REL. BRENSILBER ET AL. *v.* BAUSCH & LOMB OPTICAL CO. ET AL. Certiorari, 319 U. S. 733, to the Circuit Court of Appeals for the Second Circuit. Argued October 13, 14, 1943. Decided November 8, 1943. *Per Curiam:* Judgment affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Mr. William Stanley,* with whom *Mr. Homer Cummings* was on the brief, for petitioners. *Mr. Whitney North Seymour* for Bausch & Lomb Optical Co. et al.; and *Mr. Raymond M. White* for Carl Zeiss, Inc.,—respondents. *Solicitor General Fahy, Assistant Attorney General Shea,* and *Messrs. K. Norman Diamond* and *Robert L. Stern* filed a brief on behalf of the United States, as *amicus curiae,* urging reversal. Reported below: 131 F. 2d 545.

END OF CASE